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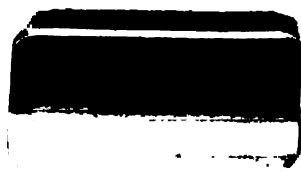
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NO. 3.

OCTOBER, 1843.

ART. I.—A MEMOIR OF WILLIAM RAWLE, LL. D.

[The following Memoir was prepared at the request of the Council of the Historical Society, and was read at a meeting held on the 22d day of February, 1837, by Thomas I. Wharton Esq., and is now published here with his approbation.]

THE ancestors of WILLIAM RAWLE came from the county of Cornwall in England.

A manuscript found among his papers contains some account of his progenitors, and some recollections of his own times, which he appears to have written in the year 1824, at the suggestion of Mr. Watson, the author of the *Annals of Philadelphia*; but unfortunately, the design was soon abandoned, and a few pages of detached memoranda alone remain. From this and other sources the facts contained in the following memoir have been derived.

Francis Rawle, the first of the race who came to America, arrived at Philadelphia in the ship *Desire*, from Plymouth, on the 23d of June, 1686, accompanied by his son Francis,

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and bringing with him five "servants," (so called in a document of the time,) who, I presume, were agricultural labourers. He died on the 23d of December, 1697.

Of his only son Francis, the second, I find the following account in the MS., of which I have spoken. "He was a man of education, though I believe of moderate property. He married the daughter of Robert Turner, a wealthy linen draper from Dublin, who took up the whole lot from Second street to the Delaware, between Arch street and M'Comb's alley. He resided on this lot, and I have seen an old draught of it, in the centre of which was the figure of a house, with this description, 'Robert Turner's large House.' Probably in these days his mansion would not be so described. William Penn had that confidence in Robert Turner, that he sent him from England a blank commission for the office of register-general for the probate of wills, &c., with power, if he did not choose to exercise the office himself, to fill the blank with any other name he pleased. The original letter from William Penn, is somewhere among my papers. Robert Turner accepted the office, and appointed his son-in-law his deputy. Francis Rawle published a book which, as far as I know, was the first original treatise on any general subject that appeared in this province. Religious and political controversy had, before this time, alone appeared from the press. The title of this work (I have unfortunately lost the book itself,) was, I believe, 'Ways and means for the inhabitants on the Delaware to become rich.' One day at Dr. Franklin's table at *Passy*, he asked me if I had a copy of the work; observing that it was the first *book* that he had ever printed. The greatness of Franklin's mind did not disdain to refer to his early occupations, in the presence of some men of the first rank of that country with whom his table was crowded."

To this account of Francis Rawle it may be added, that he was elected a member of assembly for the city of Philadelphia, in the years 1707, 1708 and 1710, and again in 1724, 1725 and 1726. It appears from the journals, that he took

an active part in the business of the house, and was frequently at the head of the most important committees. He died on the 5th of January, 1727.

William, the third son of Francis and Martha Rawle, was the grandfather of the subject of this memoir. He was a man of parts and education. His library was extensive for those days, especially in classical literature. Many of his Greek and Latin books were in the possession of his grandson. He died on the 16th of December, 1741.

Francis, the only child of William Rawle, was born on the 10th of July, 1729. He received a liberal education, possessed a robust and active mind, and is said to have been a person of very attractive manners and conversation. He was a contributor to a literary journal of the time, as I gather from some MSS. in my possession. I have also a considerable number of letters written by him in a very easy and agreeable manner.

Francis Rawle died at the early age of thirty-two, on the 7th of June, 1761, in consequence of a wound received from the accidental discharge of his fowling piece, while shooting on his grounds near the city. He was carried into his own house; and a surgical operation having been performed, he appeared to have a fair prospect of recovery, but a lock-jaw took place and he died after a week's confinement.

WILLIAM RAWLE, his only son, was born on the 28th of April, 1759. He was, therefore, little more than two years old at the time of his father's death. On a manuscript in his father's hand-writing, I find the following endorsement by him: "I believe that the within was the composition of my revered father. It never was my lot *risu cognoscere patrem*. I was too young to recognise him by any thing."

He was left, however, under the care of a mother, who, with an intellect of no common strength and cultivation, possessed every virtue that befits and adorns a Christian woman; and whose tenderness and solicitude for her offspring, swelled beyond the ordinary stream of maternal love. Subjected to

early and continued trials and adversities; deprived of husband and children; exiled during the war of the revolution, and plundered of property; this excellent woman displayed a fortitude and energy of character, which contrasted remarkably with her serene and gentle disposition. She survived to an advanced life; but the progress of years and infirmities made no impression on her warm and kindly heart. Her attachment to her children and their descendants, was repaid by all that affection and duty could offer. In her son William Rawle, she found ample solace for her cares and calamities. A more affectionate and devoted son never existed. His letters to her during all periods of his life, and his private diaries, give constant proofs how deeply the sentiment of filial love was implanted in his heart, and remind one of those better days, in which reverence for parents was felt to be a duty next to that which belongs to the great Father of all.

At the period of the commencement of hostilities between Great Britain and her colonies, Mr. Rawle was about the age of seventeen years, and, I presume, was yet a student at the Friends' Academy in Fourth street, where he received his collegiate education. His immediate relations and connexions were all adherents of the royal government. His stepfather, Mr. Shoemaker, one of the old school of gentlemen, a man of extensive reading and cultivated taste, held the office of mayor of Philadelphia during the period that it was under the control of the British army. When it was resolved to evacuate this city, it became necessary for Mr. Shoemaker to retire to New York. In conformity with the wishes of his mother, and from his own personal attachment to Mr. Shoemaker, whom he always regarded with filial affection and respect, Mr. Rawle accompanied him to New York in the month of June, 1778. They were under the necessity of proceeding by water; and he mentions in a letter now before me, that they were two days and nights on board of a small sloop on their way to Reedy Island, where they found the fleet lying,

and *thirteen* days on the passage from Philadelphia to the *capes*! This, which was extraordinary even in those days, it may be supposed he found sufficiently irksome. "Never," said he, in the letter alluded to, and which was addressed to one of his sisters, "did I listen with more attention to wornout metaphors and proverbs than now. I presently caught myself comparing our situation to that of a bird in a cage, a person chained in a dungeon, mouse-trap, matrimony, and a hundred other ancient sayings that I now felt the propriety of. In this delay we passed away the time in reading, writing, and sailing about the fleet to see our friends—friends, alas! only by similarity of misfortune."

In New York. Mr. Rawle commenced the study of the law, under the direction of Mr. Kempe, who I believe had held the office of attorney-general, and of whom he thus speaks in one of his letters. "I have begun to read law with Mr. Kempe—a man whom I admire more and more every day. Understanding, learning, generosity, sensibility, and courage, distinguish him. He is the tenderest of brothers, the most affectionate husband and father. As a lawyer, distinguished equally for skill and integrity; as a gentleman, remarkable for his politeness; as a friend, beloved for his sincerity; and my heartiest wish for my own peculiar interest is, that I may become like him." If the description of the teacher was accurate, certainly the wish of the pupil was realized; for the portrait here drawn might in all its features be taken for one of Mr. Rawle.

New York, however, in its then condition, did not afford sufficient opportunities and inducements for the study of a peaceful science: "There is something," he says in another letter, "in the air of a military government, extremely disagreeable to those who have experienced another; though, perhaps, this is one of the best administered. It makes people in civil life feel interrupted in business, and cramped in pleasures. In short, with all its advantages of strict subordination and sudden obedience, none but those who are paid

for liking it, can cheerfully endure it." "In the profession which I have chosen, it is impossible to obtain even a slender knowledge of essentials in the situation of things here. This every body agrees to; and the reason is, the military government which prevails; in consequence of which the still, small voice of the law is seldom heard and never attended to."

Under these circumstances, and being precluded from returning to his native city at that time by the political outlawry of his parents, Mr. Rawle determined to visit England, and pursue the study of the common law at its ancient fountain. "The pursuit of pleasure," he remarked in the letter from which the last extract was taken, "is the farthest thing from my thoughts in going to England. But the pursuit of knowledge I am ardent in. Two or three years' study in the Temple, will qualify me for the bar; and if at the expiration of that time, things should not be settled in America, (which, however, is an improbable thought,) I can then by engaging a little in practice, prevent myself from forgetting what I have already acquired, and perhaps obtain a moderate income during the time I should stay. This it would be impossible to do here, where I can neither learn, nor derive advantage from what I have learned." Having obtained the consent of his mother, he embarked on the 13th of June, 1781, on board one of the vessels of a numerous British fleet, destined in the first instance to Ireland, and arrived at Cork on the 18th of July, after a short and agreeable passage. From Cork he proceeded to Dublin, over the same road that had been travelled by his father twenty-five years before. A narrative of his voyage and tour in Ireland, written for his mother, is in my possession. The commencement exhibits a prevailing feature of his character, to which I have already adverted. "I have endeavoured," he begins, "to recollect a few circumstances of my journey from Cork to Dublin last summer, in order to obey a request of my mother's, though I am afraid she will meet with little satisfaction in them, farther than that they were written by one who thinks his highest praise to be the title of an

affectionate son." The journal fills a volume of a hundred and twenty-five pages, written in an easy colloquial style, which is often more agreeable than elaborated composition; and contains good descriptions of external nature, and well told anecdotes of the people. I should be glad to make some extracts from it, did I not fear that this memoir would be enlarged beyond the usual dimensions.

Mr. Rawle arrived in London in August, 1781, and immediately entered himself a student in the Middle Temple; to which he was recommended by Mr. Eden, who had been in America, as one of the commissioners in the abortive attempt to bring about a settlement of the dispute between the two countries. I have before me the certificate which he received on his admission to the temple, and which runs thus:

"Die 17 Augusti, 1781.

Mat. *Gulielmus Rawle* filius unitus *francisci Rawle* nuper de civitate Philadelphie in America mercatoris, defuncti, admissus est in societatem Medij Templi Londini, specialiter.

	£	s	d
Et dat pro fine	4	0	0
Pro feodo & impressionibus	6	14	6
	£	10	14 6

John Manley, Tr.

Cop. exam.

J. Horsfull Sub. Thes."

It appears from this document that the initiation fees into the society, in those days, were equal to about \$50 of our money. I find also that his "rooms" cost him £30 sterling per annum.

It is to be regretted that Mr. Rawle's journals of his residence and studies in England, have not been preserved. Judging from what I have read of his letters and narratives on other occasions, I have no doubt that they contained a great

deal of what would be read now with pleasure and advantage. From his letters to his mother and sisters written during that period, I may be allowed to make a few extracts, illustrative of his pursuits and opinions, or interesting from the persons to whom they relate.

"Mankind in England," he says in one letter, "differs very little from mankind in America;—a few external circumstances may, indeed, give a different colour and appearance to their actions for a while; but familiarized to those circumstances, we discover that the same passions and motives universally influence in the same manner.—London is indeed a vast collection of people; but these people are much like those I have left behind;—virtue is honoured and vice despised, much the same in both countries; and whatever satirists may say to the contrary, I am convinced that the world ever applauds virtue as it deserves. In defence of herself, vice throws out a variety of allurements, which make but a faint and transient impression—so soon as we recollect that they are but the allurements of vice: contrary to Pope's lines on the subject, I am of opinion that they are the most forcible at first sight, and that it is only in consequence of contemplating them seriously, that we discover and abhor their internal deformity.—In that pursuit of happiness to which the mind is naturally disposed, a very little reflection will induce us to leave vice behind, and to follow the footsteps of virtue, from whom alone we may expect those 'lasting hours of waking bliss,' that durable felicity with which she always rewards her votaries; and without any common-placing on the subject, I am so seriously convinced of this argument, that I should always lament the first step to vice as the first step to misery."

"I was very early gratified," he says in another letter, "with the sight of the king, which most strangers are desirous of. He is tall and well made; and were it not for his white eyebrows and gray eyes, would be a very handsome man. He talked and laughed incessantly during the whole play, with some of the lords in waiting; contemplated every part of

the house with his opera glass, and behaved more like a young man of abundant gaiety, than what I had always conceived to be a style of royalty. The queen, who is by no means handsome, but much resembles the picture governor Franklin had of her at Burlington, was received at entering the house with the loudest applause; she paid her respects, both in coming in and going out, with great affability, and behaved during the whole time with a modest dignity truly attractive. The Prince of Wales resembles neither his father nor mother; he has dark hair and eyes, and looks something like lord Cathcart; though a very large man, he is exceedingly graceful and genteel, and appeared infinitely more serious than his father. The play was such as one would suppose, none but a depraved taste would have thought of, and a vitiated age received. The beggars' opera was performed in reversed characters. The women acting the men's parts, and the men the women's; yet the royal family appeared perfectly pleased with it; and it has been performed eighteen times with infinite applause. When the parliament meets, and the courts of justice are opened, I expect to have full employment for myself. At present having few people to visit, and unwilling to exhaust at once that great fund of entertainment London affords, which, if properly managed, would prove a banquet for a year; I sit a good deal at home particularly of mornings. I am engaged in reperusing Hume's History of England, which Mr. Dunning warmly recommended as a preliminary study to which the utmost attention should be paid."

"The Londoners," he says in another passage, "are so accustomed to speak of their favourite city in panegyric strains, that I fancy to confirm their observation, one must be very willing to be astonished. I must confess that on my arrival, the town fell far short of my expectations: whether it was that the descriptions I had heard had been too highly exaggerated, or that passing through Dublin, which resembles it so nearly, had prepared my mind for populous and magnificent cities, it struck me with very little surprise. But a

farther acquaintance has opened a number of matters I was a stranger to; and the more I see, the more wonder is excited. The difference of ranks from the highest affluence and luxury, descending through a variety of degrees to the lowest poverty and distress, is every where visible. It is productive of that envy and desire which prompts those who are below to ascend, and occasions an imitation of manners sometimes awkward, and an emulation in expense often ruinous. It is impossible for me to say how low this desire of rivaling their superiors descends; but I suppose each different gradation looks up to the one immediately above, and treats those below it with indifference and contempt. I have been sorry to see those I thought superior to prejudices of this sort, indirectly aiming at a sanction for their sentiments, or claiming an approbation for their manner and way of living, from their particular intimacy with such and such persons of high birth and fortune. I hardly know a circle of acquaintance which has not some Apollo of this kind, who is quoted as a pattern, or alleged as an authority for every thing that is done. As if a middle station was more ignorant of the pleasures and refinements of life than a higher one, or society rendered happier by being hourly reminded of its inferiority. The equality of ranks is what will always render America an agreeable residence; but an Englishman boasts of that equality, which, with a strange capriciousness he never enjoys: while he proudly reports that he knows no superior but the law, he humbly adopts the manners of those who have no other claim to superiority than the feeble advantages of birth and fortune. Yet why should I be so earnest in seeking out their faults, when there is so much to praise in their virtues? They are sincere, generous, benevolent, and brave; they are liberal in their charities, and warm in their friendship; if they are slow in forming intimacies, they are more constant to them when formed; if they are not so indiscriminately hospitable as in Ireland, it is, perhaps, because they pay a proper regard to their own satisfaction in the admission of their guests. In

Ireland, it is sufficient to be a stranger, to be hospitably entertained: in London when strangers, that character procures relief to the distressed; but a man is laughed at, who supposes nothing else necessary for him to be taken notice of. Among the list of their virtues, may be reckoned industry and sobriety; at least, if the last is not to be reckoned among one of the virtues, it secures the practice of them all. A general goodness of heart pervades even the lowest ranks of people: and I have been surprised to see when an accident happened in the streets, what numbers were collected immediately to afford assistance. I think myself obliged to testify, that the roughness and brutality attributed to the common people, as far as I have seen, have been as much exaggerated as the other accounts of the country; and though I have been three months in London, and spent a good deal of time in the streets, I have not seen more instances of it, than the same time would have furnished me with in Philadelphia. It is true, I have not been in St. Giles nor Billingsgate."

"At present," he says in another letter, "there is an absolute dearth of political publications; and no one thing worth sending out has been published since I have been here: perhaps the meeting of parliament may produce something. The long vacation is at length over, and Westminster Hall was yesterday opened in the usual form. I had the first opportunity of gratifying myself with the sight of lord Mansfield. It is very common to form ideas of persons' figures from their characters, and equally common to be disappointed: my expectation of majestic dignity, dwindled away at the sight of a decrepit man of seventy-eight, with no other expression in his face than good nature, hobbling with difficulty under the weight of a trailing gown. But after he was seated on the bench, when he came to deliver his sentiments on an argument between those two celebrated orators, Dunning and Erskine, a fire and animation took place in his countenance, that did full justice to the genius and judgment he displayed in his speech. I have absented myself from the hall to-day

on account of writing letters, but I shall return there to-morrow. On Friday the lord mayor engrosses all the business, to see whose procession, and spend the day, I have two invitations."

He did not form a very high opinion of the eloquence of parliament. "I must confess," he says in another letter, "that I have heard nearly as much eloquence and oratory in a six-penny place called Coachmakers' hall, as ever I did within the walls of St. Stephens: so true, it is that eloquence is not to be purchased by wealth, nor obtained by mere study."

Mr. Rawle's residence in England was shorter than he contemplated when he left New York. The war in America was drawing to a close, and he saw the necessity and propriety of returning to Philadelphia, as his place of residence and the scene of his future professional employment. In a letter to his mother, dated on new-year's day, 1782, he thus expresses his views.

"When I see the numerous Americans that are to be found in this city; many of them once lords of thousands, now torturing themselves to subsist upon the scanty stipends allowed them in compensation for the loss of their estates, I must confess it fills me with compassion. Hitherto I have in some measure escaped the general wreck of fortunes, that so many have undergone. At least something, though small, remains secure; and I think myself obliged to risk it no longer, and not to involve myself in that want, which would throw me into an unwilling and burdensome dependence on my father-in-law, for whose virtues I have too much regard to wish to add to his sufferings. I doubt not, you will approve of my intention of returning to Philadelphia, and submitting to that authority which is there established. Though the step may be in some degree humiliating, yet I have nothing to fear, as I have nothing to charge myself with. I have in no one instance taken a decisive part on either side; unless that voyage to New York, which was the effect of filial duty, should be urged as a crime."

"It is true that this is the most eligible place for every kind of improvement; but it is a melancholy farce to improve myself for situations I should never attain to,—for even if I should be obliged to give up the thoughts of returning to America, I should never expect to rise in this country,—the many hundreds of competitors that are to be met with in almost every line, render it almost impossible for a stranger to succeed,—and in the law particularly they are too numerous to leave a shadow of hope, to one so unknown and unsupported as I should be. Besides which, the country itself is not by any means as agreeable to me as America once was, and probably will be again, when the present turbulence has subsided. The disparity of ranks is here so great, and the destructive emulation of appearance and expense in the middle line so prevailing, that a fortune of £500 currency, a year, is in fact more valuable in America than treble that sum sterling in England: I mean with respect to the weight and influence it would give, and the happiness and content it would afford. To return to my former situation at New York, and continue to waste my youth in absolute uselessness and inactivity, would be folly in the extreme."

He was advised by Mr. Eden to apply to the British government for a pension, as a compensation for the loss of his paternal property which had been confiscated; and he was assured by many other friends that his application would be successful; but he declined at once, and positively, to allow any step to be taken for the purpose. "Besides," he said, "that the measure would tie me down in a manner that I do not approve of, I do not think myself entitled by any thing I have done, to ask for and receive that allowance from the government, which ought only to be extended to the loyalist, who has sacrificed his fortune in support of his sovereign, and who is therefore entitled on the plainest principles of reason to a recompense for it."

Mr. Rawle left England in pursuance of his intention to return to America by way of France, and arrived at Ostend

on the 26th of April, 1782, whence he proceeded Here he stayed eight days only, "a time," he says was "infinitely too short to gratify curiosity in a place so abundantly supplied with every thing wonderful in art; but the pleasure of meeting or making many friends. Dr. Franklin and his grandson are in perfect health; they live in an elegant villa three miles from Paris, and are everywhere caressed, and visited by people of fashion. Temple is a very sensible and accomplished young man," &c. before me the passport granted to him by Dr. Franklin the 8th of May, 1782, and subscribed in his well known

Mr. Rawle's journals and letters, written in France, are equally entertaining and agreeable, with those relating to Ireland and England. Besides an easy and attractive style of writing, he possessed a remarkable talent for drawing, which enabled him to illustrate his journals with sketches of scenery and figures, very naturally delineated. He was detained at Ostend and Boulogne a much longer time than expected, principally in consequence of the difficulty of obtaining a passage in a suitable vessel. He finally left France on the 20th of November, and arrived in Philadelphia the 17th of January, 1783; having been absent from his place four years and a half.

Immediately upon his return, he resumed the study of law, and was admitted to practice in the court of common pleas for the city and county of Philadelphia, on the 1st day of September, 1783.

On the 13th of November following, he was married to Sarah Coates Burge, a lady whose virtues and accomplishments gladdened nearly forty years of his life; and who had the misfortune to survive.

Mr. Rawle's professional career was not distinguished by early success. Like many others, who have reached the loftiest eminence at the bar, he found the first steps of his journey beset with difficulties and surrounded with disadvantages. His progress was slow, and sometimes almost

imperceptible; and he has told me more than once, that such were the obstacles he met with, and so strong his fears of being unable to derive enough from his profession to support his family, that he had determined at one time to abandon it, and retire into the country to an agricultural life, to which he was always warmly attached. He was induced to persevere however; and by employing his hours of leisure, which were numerous, in study, and by careful attention to, as well as attendance upon the practice of the courts, he was enabled to lay that solid foundation, without which all professional success must be insecure and ephemeral. It was not, however, until ten tedious years had gone by, that he felt himself rooted in his position, and assured of success.

He was not slow, however, in acquiring the confidence and regard of his fellow citizens. On the 25th of July, 1786, he was elected a member of the American Philosophical Society; and at the general election in October, 1789, he was chosen a member of the assembly for the city of Philadelphia. This was his first and last appearance on the stage of political life. Although repeatedly urged at subsequent periods to accept of public appointments, and to take part in political operations, he uniformly and steadily declined. Neither his tastes, nor his views of duty, led him into the arena of party warfare. Content with the distinctions of professional life, and holding with the great masters of his science, that there can be no divided worship, he was willing to leave to others whose leisure or temperament adapted them to it, the anxious struggle for party triumphs. Not that his opinions were doubtful or unsettled or that he looked with indifference upon public questions. The circumstances by which Mr. Rawle's early life and character were influenced, or coloured, have already been adverted to. A deep and abiding sense of filial duty, estranged him for a time, from the government of his native country; but when he was enabled consistently with that (to him) paramount sentiment, to return and take his place as a member of the new community, he became with sincerity and

earnestness, in heart as well as in fact, a republican citizen. He gave in his adhesion (to use a modern phrase) to the existing government, from a sincere opinion of its superiority over those founded upon the monarchical principle; an opinion derived from a thorough and careful examination of the subject, as the writings which he has left behind him exhibit. In the introduction to his *View of the Constitution of the United States*, he remarks, that "the history of man does not present a more illustrious monument of human invention, sound political principles, and judicious combinations, than the Constitution of the United States." To the principles of that class of public men, by whom this admirable instrument was mainly established, and under whose government it was administered for twelve years, he was firmly though not blindly attached. Holding generally the same doctrines, though not approving, as I have reason to believe, of some of the later measures of their political life, he declined the character and pursuits of a partymen. The only public office which he ever held, was that of attorney of the United States, for the district of Pennsylvania, which was conferred upon him without solicitation, and voluntarily resigned by him. The commission, dated the 18th day of July, 1791, and signed with the venerated name of him who never conferred an office from an unworthy motive, is now before me. The appointment was made on that day to supply a vacancy, and was confirmed by the Senate on the 7th of November following. He resigned the office on the 6th of May, 1800, in the administration of Mr. John Adams. During the period in which Mr. Rawle held the post of district attorney, the Commonwealth of Pennsylvania was disgraced by two insurrections against the authority of the general government; both of them as vulgar and sordid in their motives, as they were weak and disjointed in their operations. By direction of the president, he accompanied the district judge, and the military on the western expedition in 1794; and it became his duty to prosecute the offenders after the insurrections in that year,

and in 1798, had been put down. In one instance, (the case of *Fries*,) the prisoner was capitally convicted: a new trial was granted on account of some informality in the proceedings: he was again convicted and sentenced to death, but afterwards pardoned. Mr. Rawle was also called upon to prosecute for other political offences. In the performance of these painful duties, I believe that he lost none of the respect of his fellow citizens of any political denomination. Firm in the execution of his office, he was, as I have had reason to know from his papers, far from making any unbecoming sacrifice of opinion to those from whom he derived it; and his deportment to those, against whom he was required to appear, was always characterized by mildness and forbearance.

In the MS. to which I have before referred, there are some recollections of the latter part of the 18th century, which may not be improperly introduced here.

“Anthony Benezet honoured me with his friendship: he sometimes brought his MSS. to read them to me. One day he jocosely observed, ‘Moliere had his old woman to whom he used to read his works; and thou, though a young man, shall be my old woman.’ He was treated with great respect by his countrymen here. I once had some business to do with the French minister, the Chevalier de la Luzerne, and Anthony Benezet was good enough to accompany me to his house. The minister was a man of much state in his manners, but I was delighted to see how kindly and respectfully he received the good Benezet. He made him sit down in his own seat, and took a plain one by his side. ‘*Vous êtes le pere de tous*,’ he said, as he pressed him into his splendid arm-chair. Benezet was not a taciturn man: his conversation was always tinctured by philanthropy of the highest order. The situation of the negro race was, as may be supposed, his most frequent theme. His person was small, his countenance

plain; but in conversation much animated. He commonly wore a suit of cotton velvet of a dark olive colour."

"Dr. Franklin towards the close of his life, formed a society to meet at his house once a week. Its appellation was 'Society for Political Inquiries'—but general politics only was intended to be the subject of discussion;—general Washington was one of the members; Robert Morris, Gouverneur Morris, Dr. Rush, George Clymer, Mr. Bingham, Mr. Wilson, Bradford, Robert Hare (an accomplished classical scholar) and others to the number of forty-two belonged to it. Thomas Paine (not then a wretched apostate,) was also a member. Questions for consideration were sometimes proposed at previous meetings—sometimes suggested on the same evening—chiefly by our venerable president. There was no formality of discussion. Dr. Rush, who had great power of conversation, commonly took the lead. Gouverneur Morris was intelligent, sarcastic and abrupt. Dr. Franklin, though very attentive, said but little after the subject was broached. Paine never opened his mouth; but he furnished one of the few essays which the members of the society were expected to produce. It was a well written dissertation on the inconvenience of incorporating towns. We used to assemble in the doctor's library, at the house he then inhabited, standing between Market street, between Third and Fourth streets. It has since been taken down, and a street now passes over its site. His collection of books was extensive, principally however in the French and English languages. They were not in general expensively bound. The outside of a book was evidently not regarded by him. The society terminated at his death. Its minutes are now in my possession, and are intended to be deposited in the Philadelphia Library."

Although resolved from the outset to devote himself to the law profession and to allow no other employment to disturb his attention to it, a determination to which he strictly adhered during his continuance at the bar, Mr. Rawle yet readily

his services and means to purposes of public good, and was always ready to unite in all reasonable schemes for the advancement of science, letters and taste. He was a member of most of the public institutions of his time, and to some contributed a valuable aid. I have already mentioned that he became a member of the American Philosophical Society, three years after his return from Europe. In 1789, he became a contributor to the Pennsylvania Hospital; and in 1791, a member of the society for the establishment and support of Sunday-schools; and in the following year he joined the society, instituted (according to its title,) "for the purpose of promoting the abolition of slavery, for the relief of free negroes unlawfully held in bondage, and for improving the condition of the African race," of which society he was chosen president in the year 1818, on the death of Dr. Wistar. It is proper here to remark, that Mr. Rawle's opinions and views on the subject of the abolition of negro slavery, ought by no means to be confounded with those wild and absurd schemes which are prevalent in some quarters at this time, and furnish another evidence of the exaggerated philanthropy and extreme tendencies of the present age. He had too much of that old English endowment, called "*common sense*," but which every day seems to render less common, to suppose that emancipation was likely to be brought about by denunciation and abuse, or that it can ever be effected with safety to either race, except by the gradual progress of opinion in the communities in which it exists; and he knew too well the character and value of the constitutional provisions on the subject of slave labour, to countenance any interference with the established rights of the masters. In his View of the Constitution of the United States, he treats in the same paragraph of the separate provisions in that instrument for the restoration of fugitives from justice and fugitives from service. "The states," he adds, "are considered as a common family, whose harmony would be endangered, if they were to protect and detain such fugitives, when demanded in one case by the executive authority

of the state, or pursued in the other by the persons claiming an interest in their service."

In 1795, Mr. Rawle was elected one of the trustees of the University of Pennsylvania; an office which he held until death, and to the duties of which he applied himself during the period of forty years, with zeal and punctuality.

In the year 1805, he became a member of the Agricultural Society, and of the Humane Society; and took an active part in the establishment of the Academy of the Fine Arts; at the opening of which institution, two years afterwards, at the request of the directors, he delivered a public address, in which he earnestly vindicated the claims of painting and sculpture to the encouragement and support of a republican community.

In 1807, he was elected an honorary member of the American Society of Philadelphia, an association which I believe is not now in existence.

In 1819, at the request of the officers of the Philadelphia Society for promoting agriculture, he delivered the annual public address before that body. In this discourse, which was published by order of the society, he discussed the subject of emigration to this country, in reference principally to its effects upon agriculture, and thence to the general interests of the community; and indicated some of the duties of the government towards emigrants, and of the latter towards the community into which they are received.

In 1822, Mr. Rawle was chosen a director of the Library Company of Philadelphia, an office which he had held several years previously; but he resigned the situation again, after only a few months continuance in it.

In the same year, on the decease of the venerable James Ingersoll, Mr. Rawle was unanimously chosen to succeed him in the office of Chancellor of the Society of Associated Members of the Bar. Shortly after his appointment, he delivered an address before the society, which was published at their request. In this discourse he reviewed the early constitution and laws of Pennsylvania, particularly "the gr

law," as it was called; treated of the equity jurisprudence of Pennsylvania, and the method of administering it; and suggested the expediency of granting additional powers to the courts to do justice, according to the mode of proceeding in chancery. "It is time," he concludes, "to reduce the uncertain corruscations of Pennsylvania equity, to the safe and steady light of chancery. Some may, perhaps, dread the danger of innovation on a practice which has continued for near a century and a half. Others may think that error can receive no sanction from time, and that while the genius of our countrymen has, at least since the commencement of the revolution, been so active in almost every sort of political reformation, we ought not to decline the performance of a duty because of its toil, nor the improvement of a system on account of its antiquity."

At the next annual meeting of the society, he delivered a second discourse, which also has been published. The subjects of this address are the character of the bar and the method of practice. After adverting to the general complaint of the law's delay, he inquires into "the influence of our peculiar modes of practice, on the promotion of professional knowledge, the formation of professional character, and the progress of forensic proceedings." The difference between the subdivision of labour in England, and the universality of our practice, is in course adverted to. "With us," he says, "the term *lawyer* means a *genus*, not a *species*. Liable to be called on in every branch of business connected with the profession, it is necessary that the American lawyer should be qualified for all: he is not merely a chancery lawyer, nor a civilian, nor a special pleader, nor a *nisi prius* lawyer. He forms a living and a daily refutation of the opinion, that the science is too comprehensive to be all undertaken by one man."

He then proceeds to give some interesting recollections of the worthies of the olden time,—of Mr. Chew, Mr. Wilson, Mr. Sergeant, Mr. Lewis, Mr. Ingersoll, Mr. Edward Biddle,

and Mr. George Ross; and discusses the question of the cause of the slow progress made in our judicial proceedings. "I incline to think," he says, "that it is to be found in the length, or rather the manner of our speeches. On the trial of issues, in fact, the examination of witnesses does not generally consume more time with us than in England. Indeed their cross-examinations are commonly more dilated than ours. But speeches of the great length to which we are accustomed, are there unknown. An hour is deemed a large space of time for an address to a jury. The same moderation is carried into the discussion of arguments in bank. Nine eminent counsel were engaged in the celebrated case of *Lindo* against *Rodney*, which I had the pleasure of hearing. It occupied but two mornings. With us it would probably have employed as many weeks. The great cause of delay with us, is the introduction of books, reading entire cases, and discussing every case that is read; a practice entirely unknown there." Then, on the question how may this evil, which certainly has not diminished since the date of his discourse, be corrected,—he tells us that in Athens the duration of a speech was regulated by the *clepsudra* (or hour-glass), under the direction of the court, and that from some of the epistles of Pliny it may be inferred, that after the reign of the emperors commenced, the Athenian practice was occasionally adopted at Rome. He concludes, however, that such a power could not safely be lodged in the bench here, consistently with our ideas of "virtue, liberty, and independence," and that after all, the best hour-glass is public opinion.

About the period of these addresses, Mr. Rawle was twice offered by governor Hiester the situation of presiding judge of the district court of the city and county of Philadelphia. In both instances he respectfully declined the office. Not that he was averse to a judicial station, for which his intellect, acquirements, and temperament, well adapted him; but at that time, I believe, his practice yielded him considerably more than the compensation allowed to a judge by our inge-

nious system; and he considered himself under an obligation of duty, to persevere in the toilsome and arduous occupation from which he had hoped long before to have been permitted to retire. Domestic circumstances, however, into which it is not requisite for me to enter, made it necessary for him to continue his professional labours, far beyond the period at which they are usually suspended, and prevented his acceptance of an office which, there is every reason to think, he would have filled in a manner worthy of its importance and dignity.

In 1825, Mr. Rawle published his "View of the Constitution of the United States." This is a plain, practical, and intelligent description and explanation of the theory and operation of our political system. The introduction contains an historical account of the colonial governments of the several states, and of the federative system under which these states were nominally held together, for general purposes, previously to the year 1787. The author then proceeds to consider the several branches of the government of the United States, legislative, executive, and judicial; specifying the several provisions of the constitution in regard to each; explaining their import and bearing; and applying to them the various decisions that have taken place in the supreme court and other tribunals. Mr. Rawle's general views on political subjects, led him to concur in the construction which has been given to the powers of the federal government by the supreme court; but he has not adopted those opinions blindly, and in some instances has expressed his dissent from the judgments of that court. The volume concludes with a chapter on the blessings and benefits of the union, and of that invaluable constitution by which those blessings and benefits are secured, and it is to be hoped perpetuated: and the author finishes his work with a quotation from the farewell address of that illustrious man, "whose character," he remarks, "stamps inestimable value on all that he has uttered, and whose exhortations on this subject, springing from the purest

patriotism and the soundest wisdom, ought never to be forgotten or neglected."

The opinion entertained by the public of the value of this treatise, is shown by the circumstance of its having gone through three editions, and having been adopted as a textbook of instruction in several of our literary institutions.

In the month of June of the same year (1825), the Historical Society was established. Mr. Rawle took an active part in its formation, and was unanimously chosen president; an office which he held with, I am sure, the equally unanimous respect and affection of the members until his death. On the 5th of November following his election, he delivered an inaugural discourse before the members of the society, which forms the first article of the transactions, and serves as a suitable introduction to the many valuable communications which have been published.

In this discourse, after explaining the objects of the society, and the method in which they proposed to accomplish them, Mr. Rawle, as an illustration of the importance of historical inquiries, reviewed certain theories on the subject of the origin of the Indians of this continent, and discussed the question of the right of the European race to dispossess them, with great force of argument, and with his characteristic kindness of disposition and Christian temper. In conclusion, he expressed a hope that the Historical Society would not, like too many others, be characterized by "vivacity of inception, apathy of progress, and premature decay." "The treasury of literature," he adds, "is grateful for the widow's mite. Let all contribute what they can, and they will contribute what they ought: let no opportunity be lost in throwing into the common stock, not only what may be collected of times that are past, but whatever may be of interest in relation to time that is present."

Mr. Rawle did not confine himself to a preliminary effort. He took an active part in the business of the institution, and a warm interest in its success; and he punctually attended the meetings of the council until disabled by bodily infirmity.

In February, 1826, he made a communication to the society, touching the valedictory address of president Washington; which was referred to a committee, consisting of himself, Mr. Morgan, and Mr. Ingersoll. Those gentlemen, it is known, addressed letters to several distinguished friends of Washington, who yet survived; and obtained from them information exceedingly interesting in a literary point of view; but far more important from the conclusive proof it afforded, that the farewell address was throughout written by the venerable patriot whose signature is affixed to it. About the same time, Mr. Rawle communicated to the society a "Vindication of the Rev. Mr. Heckewelder's History of the Indian Nations." He also furnished a "Biographical Sketch of Sir William Keith," one of the governors of the province of Pennsylvania, though his name is not given to this article; and "A Sketch of the Life of Thomas Mifflin," the first governor of Pennsylvania after the revolution. These, I believe, are all his contributions to the stock of the society; and they certainly prove not merely his regard to his duties as a member, but the activity of his mind and the variety of his knowledge.

The opinion entertained by a distinguished literary institution of his learning and worth, was manifested by the degree of LL. D., conferred upon him September, 1827, by the College of New Jersey. The distinction is believed to have been entirely spontaneous on their part, and was certainly unexpected by him.

In the year 1830, Mr. Rawle was appointed by governor Wolf, one of the three commissioners whose duty it was "to revise, collate, and digest all such public acts and statutes of the civil code of this state, and all such British statutes in force in this state as are general and permanent in their nature," and to consider and report what alteration and improvements were required therein. Mr. Rawle was the first named in the commission, and his appointment was universally approved. He brought to the important and difficult

task, which at the age of seventy he thus undertook, an ample stock of legal and general knowledge, great personal experience of the operation and practice of the laws, and withal an activity of mind and earnestness of purpose, which are seldom displayed at that time of life. During the four years of employment under this commission, his colleagues found him always ready for business, always prepared with his quota of work, always prompt in communicating his abundant knowledge, and equally disposed to receive the suggestions of others, and remarkably free from prejudice or tenacity of opinion; and they have the satisfaction of reflecting, that although in the course of their arduous labours they occasionally differed from him in views of subordinate matters; yet, that in all important questions, their conclusions were as unanimous as their intercourse was harmonious.

Mr. Rawle joined in all the reports made by the commissioners to the legislature excepting the last, which was prepared and transmitted in March, 1836, a few weeks only before his decease.

In the year 1830, Mr. Rawle presided at a town meeting held in consequence of the then recent revolution in France, and was placed at the head of a committee appointed to convey the resolutions adopted by the meeting, to general La Fayette. I have before me a copy of the letter, in the handwriting of Mr. Rawle, addressed to general La Fayette, and the original of the answer in the handwriting of that eminent person.

In 1831, Mr. Rawle received an unexpected and gratifying evidence of the affection and respect with which he was regarded by his professional associates. At a meeting of the members of the Bar of Philadelphia, held on the 20th of December, it was unanimously resolved, that they were "desirous to express their respect and regard for their venerable associate, and to preserve a likeness of one who has contributed to do honour to his profession;" and they accordingly solicited him to sit for his portrait, to be painted at their

expense, and to be placed in the room of the Law Library. The request was complied with: a very striking likeness was produced by Mr. Inman, and now occupies its destined position along side of the portrait of chief justice Marshall, painted at the request of the same bar, and not far from that of his old friend William Lewis, whose very striking portrait painted by Stewart, was within a few years found among the lumber of an auctioneer's store-room, and presented to the Bar by Mr. Head.

Shortly after this, Mr. Rawle delivered by request, an address before the Law Academy. The subjects which he chose were the importance of adequate preparation of knowledge for the study of the law; which he explained and enforced with great earnestness and emphasis. In concluding this discourse, he paid a merited tribute to the eminent and distinguished individual who presides over the Philosophical Society, and who now so worthily fills the situation which he at that time held, of president of this society. "It is almost half a century," he said, "since the commencement of an acquaintance, and the formation of a friendship with your learned and amiable provost, who after fighting the battles of his adopted country, immediately turned his attention to the study of her laws. Neither the variety of his literary pursuits and accomplishments, nor the pressure of age, have interrupted the continuance of his devotion to this exact and interesting science. May you, my young friends, imitate his example. May you all be convinced, that those who unlike him, relinquish the improvement of the mind before its faculties have failed, will find in the torpor of age neither dignity nor happiness."

In 1831, at the request of the Philosophical Society, Mr. Rawle prepared a short biographical account of his early friend, Zaccheus Collins, who had died a short time previously. This memoir was, I believe, the last of his merely literary compositions. His time during this, and the two succeeding years, was mainly employed in the revision of the

laws; and he had little leisure, if he had the desire, to appear again as an author.

His constitution too began to give way. For sixty years he enjoyed almost uninterrupted health. About ten years before his death, he was attacked by a distressing complaint which required all the skill of his eminent physicians to cure; and to prevent the recurrence of which, he was placed under a rigid and particular diet; abstaining almost altogether from vegetable food.

During the year 1835, his bodily infirmities increased rapidly, and he was seldom able to leave his house; but mental vigour and activity were unabated. He read a great deal; and few men have found greater enjoyment in books or more fully verified and realized Cicero's description of them. Literature was in truth the delight and ornament of his youth, the relaxation of his manhood, and the solace and comfort of his declining years. He was, during a great part of his life, unfortunately subject to inflammation of his eyes, which disabled him from reading at times, and especially at night; but he was never without those who were happy to be the means of imparting gratification to him, and whose filial piety, doubtless finds in the recollections of duty well performed, some alleviation of the loss they have experienced.

After a confinement of several weeks to his sofa, or bed, during which the decay of nature was gradually taking place, not unaccompanied with painful and distressing ailments, which he endured with great fortitude and composure, our venerable friend and associate departed this life on the 15th day of April, 1836.

In the preceding pages I have endeavoured to comply with the request of the society, by submitting to them a memoir of the life of their deceased president. I have not written a eulogy. Neither their wishes, nor my disposition tend that way. The language of overstrained praise, would be unsuitable to the simplicity of his character.

It is proper, however, before closing this paper, that I should mention some of the principal features of a character, which, in childhood, I learned to regard with a respect and affection, which the almost daily intercourse of after life in no wise lessened.

Mr. Rawle was an accomplished jurist, a good scholar, and a person of great taste and great general acquirements. His reading in early life had been extensive; and he brought to his professional studies a discriminating and healthy mind, which enabled him to make the best use of what he read. His learning was not confined to the jurisprudence of England and America, but extended much deeper into that of the ancient and modern law of the continent of Europe than was usual in the last century. His professional business for the twenty years between about 1793 and 1813, was very great, and his income large. His name appears in most of the important causes of that period, and his arguments always commanded the attention and respect of the court. His address to a jury was simple in diction, always free from unnecessary ornament, but earnest and impressive. I have already said that his deportment was conciliating to his adversaries; and I believe that it may be said with truth, that he never made an enemy at the bar.

His classical knowledge was more extensive and accurate than that of most men in this country, not scholars by profession. He read a great deal, and to a late period of his life, in the Roman authors. Many of his editions belonged to his grandfather, William Rawle. With the Greek writers, he was not so familiar; though he made the Greek Testament a frequent study. He was fond of poetry; and at one period of his life, wrote a great deal of it and very agreeably; but, I believe, few of his verses are left. I have mentioned in another place, that he drew and painted well. I have seen sketches of his, that would do credit to artists of reputation.

These, however, were the mere ornaments or externals of

a character, the fabric or substance of which was great moral worth, founded upon and sustained by religion. Mr. Rawle was at all periods of his life a devout man. He had thought, read, and written much on the subject of religion. I have perused many MS. volumes written by him on the evidences, doctrines, and working of our Christian faith; and have found reason to admire the extent of his research, the wisdom of his remarks, and the gentle and catholic spirit by which they were dictated. He was a sincere believer in the fundamental doctrines of the Christian religion. He admired its beautiful morality, and was deeply sensible of its adaptation to the wants of society. In the latest years of his life, religion occupied a large portion of his thoughts. As the shadows of evening gathered round him, he seemed desirous to close the shutters upon all mere human speculation, and enlightened and warmed by the faith of the gospel, to commune with his own heart, and prepare himself for the great event that was drawing nigh. This is not the time for the publication of any of his devotional writings or speculative opinions. Hereafter possibly they may see the light. I will only add, that by birth, a member of the Society of Friends, Mr. Rawle never ceased to entertain the highest respect for that excellent body, and generally attended their place of worship when his health permitted, although he differed from them in some points of opinion respecting language and attire. Mr. Rawle's religion, as I have intimated, was not an abstract or inanimate speculation. It governed and influenced his whole life. It controlled and tempered him during many years of prosperity, and sustained and comforted him in later days of distress and misfortune.

With qualities of mind and heart such as I have mentioned, Mr. Rawle passed a life of seventy-six years, without stain or reproach. Popularity, perhaps, in the prevailing acceptance of the word, he did not seek to possess. That "habitation, giddy and unsure," which in the words of the poet he hath "who buildeth on the vulgar heart," it was not his ambition

to possess. He sought and acquired that enduring reputation which is founded on the good opinion of the wise and virtuous of this world; and may we not hope that at the close of that venerable life,

"the ETERNAL MASTER found
The talents lent him well employed!"

LETTER FROM MR. DU PONCEAU TO THE
AUTHOR OF THIS MEMOIR.

Philadelphia, 3d June, 1837.

TO THOMAS L. WHARTON, ESQ.

My Dear Sir:

I sit down with pleasure to comply with your request, by committing to writing my recollections of our lamented friend, William Rawle, during an acquaintance of more than fifty years. Unfortunately, I cannot add much to what you have related in your interesting Biographical Notice, presented to the Historical Society of Pennsylvania, which is to be published in the forthcoming volume of their Memoirs. During the greatest part, I may say almost the whole time of our acquaintance, Mr. Rawle and I were engaged in a laborious profession, which affords little leisure for social intercourse; and though our literary tastes were in most things similar, such was the nature and urgency of our daily occupations, that we were seldom allowed to indulge our inclination to wander into more flowery paths; for the law, as you well know is a jealous mistress, and requires undivided attentions from her votaries. The life of a lawyer in the full practice of his profession, offers very little but the dull and dismal round of attendance upon courts, hard studies at night, and in the day fatiguing exertions, which, however brilliant, are confined to a narrow theatre, and leave nothing behind but a blaze of reputation, and the echo of a name. Had Mr. Rawle had leisure to pursue the scientific labours which he so successfully began, in his View of the Constitution of the United States, a full length picture of his mind would have been found in the various works, which his genius and immense fund of knowledge enabled him to produce. An author's life, it is said, is found in his works; but where is the life of an eminent lawyer or physician, whose days and nights have been devoted to the exercise of their professions? The names of Lewis and of Kuhn are dear to their contemporaries; but the next generation will probably forget them! It will not be so however, with William Rawle; though he has left little behind him, that little is of such sterling weight and value, as will transmit his name with honour to posterity.

You will now easily understand, why I can add but little to the stock of information which you have collected of the life of our excellent friend. A few

occasional anecdotes are all that I can contribute, as they occur to my memory. After the first pangs of separation, such recollections are pleasing to the mind. I dwell upon them with pleasure, while I commit them to paper, and leave it to you to make such use of them as you will think proper.

Mr. Rawle could not boast of an *Anglo-Saxon* descent. His origin must be traced to the conquerors of the Anglo-Saxons—the Normans. His name is evidently (with a little variation in the orthography,) the same as that of *Rœul*, the first duke of Normandy, who in the year 912, obtained the sovereignty of that province from Charles the Simple, king of France, who also gave him his daughter Giselle in marriage. He was an ancestor to William the Conqueror. The monkish annalists in their bad Latin, called him *Rollo*, but it is an ascertained fact, that his name was *Rœul*, which afterwards became very common in France, particularly in Normandy, whence it passed over into England, where the English *eo* was substituted for the French diphthong *œu*. This etymology was often talked over between Mr. Rawle and me; he freely admitted it, and though a Quaker, did not seem displeased to bear the same name as the conqueror.

My acquaintance with Mr. Rawle began in the year 1784, when I was studying law under William Lewis, at that time the most celebrated lawyer in Philadelphia, and perhaps, in the United States. Lewis was the son of a plain farmer in Chester county, who sent him twice a week with his truck to the market in this city, which he carried in a little cart with one horse. The courts of justice then sat in the court house, lately pulled down, at the intersection of Market and Second streets. After disposing of his vegetable store, the lad hitched his horse to a post, and went into the court house to hear the lawyers plead. After attending there for some time during repeated visits, he was at once struck with the idea, that he also could speak, if he had only the requisite knowledge. Nature had endowed him with a clear discriminating mind, a retentive memory, a powerful vocal organ, and an admirable fluency of speech. Nature had designed him for the legal profession. He felt the impulse; it was irresistible. Like Corregio, he exclaimed, *Sen pittore anch'io*; "I also am an orator, and why should not I be a lawyer as well as those whom I hear prattling around me?" Full of this idea, he went to his father, and told him he was determined to study the law, and adopt it as his profession. His father laughed at him, and well he might, for his education had not extended farther than reading, writing, and common arithmetic. He was not, however, discouraged; he did not give his father a moment's rest, until he put him apprentice to George Ross, then the most eminent lawyer in this city; under whom his progress was rapid. A few years after his admission, he was found at the head of the legal profession.

I was studying then under this able master, when I first became acquainted with Mr. Rawle. I had gone through Blackstone's Commentaries and Wood's Institutes, and was advised to enter upon the study of *Coke upon Littleton*. I wanted to have a copy of the work all to myself, to read it at my ease; but it was not easy to be procured. After many fruitless applications, I bethought

myself of putting an advertisement in the newspapers, in which I offered to give a set of Valin's Commentary on the French Marine Ordinances, in exchange for the book I so much desired to have. To my great astonishment and delight, I received a note from Mr. Rawle, (then unknown to me,) accepting of the offer. I went immediately to his house, where the bargain was concluded, and an acquaintance began between us which afterwards ripened into friendship.

I took home the longed for volume, and immediately entered upon its study. I had then no time to lose, for I had also to perform the duties of my office of notary public and sworn interpreter of foreign languages, to which I had been appointed by the executive council in the preceding year. It is not to be wondered at, therefore, if there was at that period no communication between Mr. Rawle and myself, while I was so actively and incessantly engaged. At last, at June term 1785, my good master, Mr. Lewis, who had followed my progress, and had always been ready to assist me with his lessons and his advice, which I found of immense use and advantage to me, after a long and strict examination, thought he might venture to move for my admission as an attorney of the court of common pleas for the city and county of Philadelphia. Mr. Rawle and Mr. Sergeant, (the father of our distinguished fellow citizen,) were appointed my examiners.

I met them with a trembling heart. The examination was begun by Mr. Rawle. To my utter astonishment and dismay, he proceeded to examine me on the civil and maritime law, and on the *jus postliminii*. I learned afterwards that he did so out of kindness to me. I had exchanged with him Valin's Commentaries for Coke upon Littleton. He thought I must be more familiar with the former books than with the latter; but it was quite the reverse. Mr. Sergeant relieved me by asking me questions out of the books that I had studied. Mr. Rawle fell in, and pursued the same course; after which I had the satisfaction to be distinguished with a

Benè, benè respondere,
Dignus, dignus es entrare
In nostro docto corpore.

On the favourable report of these gentlemen, I was admitted. From that moment Mr. Rawle showed me marks of particular friendship. I visited him frequently, and was always kindly received. I was in a manner domesticated in his family. For some time we engaged together in the study of the German language, of which I had gained some slight knowledge in the family of Baron Stenben. We did not pursue it long together; the interruptions of business did not permit it. However, I know that he continued afterwards the study of that language; but to what extent he acquired it, I cannot exactly tell. I remember that one day we were sitting together in the court room, at a meeting of the bar, for what was called *settling the dockets*.¹ In the intervals of business, the

¹ I do not believe that there is a gentleman at our bar, myself excepted, who knows the meaning of the expression, *settling the docket*, as it has long since fallen

lawyers would converse with each other; and a great deal of mirth and good humour generally prevailed. On that occasion, the conversation turned upon ignorant judges, who were not a rarity at that time; when the president of the court of common pleas, was an honest justice of the peace, who kept a little shop some where in Chestnut street, and knew no more of law than he did of Greek. Many hackneyed stories, well known among the profession, were related upon the subject. While this was going on, I wrote on a small slip of paper the following German epigram, which I had read some where, and handed it across the table to Mr. Rawle.

Mein Sohn! weist du was,
Bist ein advokat;
Mein Sohn! weist du nichts,
Bist ein Geheimer Roth.

Mr. Rawle immediately wrote, and sent to me the following poetical translation.

Our Tom is a wit, at the bar he will drudge;
Our Will is a fool, and we'll make him a judge.

This shows that he was not unacquainted with the language of Schiller and Goethe.

Among the marks of friendship which I received from Mr. Rawle at that period, I shall never forget that he was the first who took me in as assistant counsel in a cause of some importance. It was a Quaker cause, of a mercantile character. More I do not recollect, except the name of our client, which is here of no consequence. To me, a stranger in the land without connexions, and at the beginning of his career, it was rendering a great and an essential service. It was also a mark of confidence for which I felt grateful ever after; and I often took occasion to remind Mr. Rawle of it, and express to him again and again the sentiment of gratitude with which it had inspired me. I am happy in this opportunity of recording it.

It was not, however, that I wanted business. My notary's office kept me much employed. On looking at my docket for September term, 1785, the first after my admission, I find I was then concerned in twenty-one suits, either for plaintiff or defendant. It was a pretty good beginning. Indeed, I had begun to practice since the year 1783, in the name of a young attorney called William Murray Jr., who soon after I was admitted, left this for the western country, where he died. Thus I became acquainted with the forms of proceeding. But

into disuse. The lawyers used to meet at the beginning of every term at the prothonotary's office, or in the court room, where all the actions on that docket were successively called over by the clerk, and were put at issue, marked for trial, or continued. Rules to declare or plead were taken, pleas and replications were given, and judgments confessed; and causes were marked for trial, or argument. All this was done *vis à voce*, and short entries were made by the prothonotary, from which the lists of trials and arguments were made out at each term. The dockets of the supreme court and of the common pleas, were settled in the same manner. I am told that the practice is still followed in some of the county towns of this state.

I was not the less obliged to Mr. Rawle for distinguishing me as he did; which gave me a standing at the bar, which I could not have expected for many years to come. I am happy in this opportunity to pay a grateful tribute to his memory.

I was not the only young man whom Mr. Rawle thus patronised; for benevolence was a strong trait in his character. I particularly remember a foreigner whom he generously took by the hand, and by his recommendations introduced into business in the line that he professed, and who afterwards repaid him with the blackest ingratitude. I forbear saying more upon this subject. I must not disturb the ashes of the dead. The ungrateful man gradually lost by his conduct the esteem which Mr. Rawle's friendship, and some talents that he possessed, had obtained for him. He left this country and went to England, where he died. There are, probably, persons yet living who will know to whom I allude.

I married in the year 1788, and from that time I began to lead a very retired life, attending only to the duties of my profession. My intercourse, therefore, with Mr. Rawle, was not so frequent as it used to be. We met in courts of justice in a friendly, but not so intimate a manner as theretofore. In the same year the federal constitution was promulgated. We took different sides. I regret to say, that I belonged to what was called the anti-federal party. I thought I was right: subsequent events have proved that I was in the wrong. The French revolution followed, and parties became still more exasperated. Under the administration of the elder Adams, Mr. Rawle was made district attorney. This brought us still more in opposition to each other; for in the great political causes, and the prize causes, which at that time were so numerous, we were almost always engaged on opposite sides. Notwithstanding all this, I can say with truth, that our mutual esteem never suffered any diminution. We met as antagonists, but always parted as friends. In all our forensic debates, and they were numerous, I do not remember a single harsh expression, or even a word that could inflict a wound on one or the other of the combatants. Mr. Rawle was sometimes satirical: he never suffered an unguarded expression of mine to escape, without some good stroke of wit, that was any thing but amusing to me; but it was always done in such a delicate, good humoured way, that it was impossible for me to take offence; and I well remember that once, when I had in an address to a jury fairly laid myself open to his shafts, I begged of him to spare me in his reply, which he was kind enough to promise, and kept his word.

In the beginning of the present century, during the reign of the embargo, non-intercourse, and other restrictive measures produced by the British orders in council, and the Berlin and Milan decrees, a great number of causes were carried up from this city to the supreme court of the United States. The counsel engaged in those causes, were in the habit of going together to Washington, to argue their cases before that tribunal. These were Mr. Ingersoll, Mr. Dallas, Mr. Lewis, Mr. Edward Tilghman, Mr. Rawle, and myself, who am, alas! the only survivor of that joyous band. We hired a stage to ourselves, in which we

proceeded by easy journeys. The court sat then, as it does at present, or did until lately, in the month of February; so that we had to travel in the depth of winter, through bad roads, in the midst of rain, hail and snow, in no very comfortable way. Nevertheless, as soon as we were out of the city, and felt the flush of air, we were like school boys on the play ground on a holiday; and we began to kill time by all the means that our imagination could suggest. Flashes of wit shot their coruscations on all sides; puns of the genuine Philadelphia stamp were handed about; old college stories were revived; macaronic Latin was spoken with great purity; songs were sung, even classical songs, among which I recollect the famous Bacchanalian of the arch-deacon of Oxford, "*Miki est prepositum in tabernâ meri*," in short, we might have been taken for any thing but the grave counsellors of the celebrated bar of Philadelphia.

The Emperor Napoleon was right, when he told the great actor Talma, that he did not know how to act the part of kings, when conversing with their confidential friends. "You make us speak," says he, "as if we were in a public audience in the full display of majesty. You should, on the contrary, make us speak exactly like other men; when in the bosom of our families, and with our intimate friends, we take off with great pleasure, the mask that we have been obliged to wear in public; and freed from that troublesome constraint, we sometimes say and do more foolish things, than those who are always at liberty to do as they please." So did the Philadelphia lawyers, when they had left the bar and the judges many miles behind them. Mr. Rawle was not so excited as some of us were: he was always mild and placid; but his strokes of wit produced the greater effect, as they came from him naturally and without study or pretensions. Mr. Ingersoll sat serious and composed, thinking of his causes, and little inclined to mirth. I sometimes thought of addressing him with *Cui in theatrum, Cato severo venisti?* I shall always remember with pleasure, those delightful journeys, in which we all became intimately acquainted with each other; for on such occasions, when free scope is given to the imagination, men appear in their true characters, and no art can prevent them from showing themselves as they really are.

Our appearance at the bar of the supreme court was always a scene of triumph. We entered the hall together, and judge Washington was heard to say, "This is my bar." Our causes had a preference over all others, in consideration of the distance we had to travel. The greatest liberality was shown to us, by the members of the profession who usually attended that court. It was really a proud thing at that time, to be a *Philadelphia lawyer*.

We returned home, of course, in the same manner that we had proceeded to the capitol. We occasionally met with accidents in going or returning, but none that is worth relating, except the one that I am about to mention. It was in the year 1808. I had argued against Mr. Rawle, the cause of *M'Ilvaine v. Cox* (4 Cranch 209.) The main question in this case was, whether a native of New Jersey, who had left this country shortly after the declaration of independence, and had ever since resided abroad and always adhered to his first alle-

giance, was to be considered as a citizen or an alien. I contended that he was born a British subject, and remained such through life. On the other side, it was argued that the revolution was a *new birth*, and that on independence being declared, he was made a citizen *against his will*. On this I observed, that I had never heard of a surgical operation, by which the subject was extracted from the womb, with the revolutionary *forceps*. This produced much mirth on the bench and at the bar, as did the strokes of keen wit which Mr. Rawle, who was a counsel on the other side, shot at me in reply. On the whole, however, I lost my cause; and the obstetrical operation was decreed to have been *secundum artem*.

This little incident would not be worth relating, if it were not for the comico-serious accident that it produced. The cause that I have mentioned, being the last we had to argue, we immediately afterwards set out on our return home. The argument of that cause was yet fresh upon our minds, and became the subject of conversation, on our way to Baltimore. We were all in very high spirits, and the *forceps* was found a very good subject for railery. Mr. Rawle had said something about a poker, which hit the fancy of our colleagues, and which I cannot now remember. When the spirits are high, any thing will do to found a jest upon. So that the poker and the forceps became the common topics of our conversation. Every one cracked his joke upon one or the other. Fingers were pointed at us, in imitation of those instruments. To such a degree was our mirth carried, that our Irish driver, listening to us, did not perceive a stump that was before him: the carriage made a terrible jolt, our phæton was thrown from his seat, the horses took fright, and ran away with us at a dreadful rate. A river or creek was before us, and the bridge was not very safe. It was determined to jump out of the carriage. I was pressed to show the example, but I did not choose to do it, intending to take my own course. I have heard it related, that at that moment, I took a pinch of snuff very leisurely; but that I do not remember, and I very much doubt the truth of the fact. Be that as it may, all except myself jumped out of the carriage. Being then left alone, I collected all my presence of mind, looked about me, chose my position, and jumped out so fortunately, that I fell upon my feet without the least injury. Turning back to look behind me, the first thing I saw was my friend Lewis, sprawling upon the ground, and not able to rise alone. I raised him on his feet, and presently came our companions, who all complained of being more or less bruised. The driver alone, by a kind of miracle, had suffered nothing from his fall. We all determined to walk to Baltimore as well as we could: there was, indeed, nothing else for us to do; when to our great comfort, we saw our stage returning, under safe guidance. The horses had been stopped in their mad career, and an honest countryman was bringing them back to us, with the vehicle. We joyfully resumed our places; and on our arrival at Baltimore at the Fountain Inn, a surgeon was immediately sent for, who bled all my companions. Feeling perfectly well, I did not choose to submit to the operation. We spent the afternoon at Baltimore, and the next day resumed our

route towards Philadelphia. We had a narrow escape. I am now left alone on the stage of life, which they were doomed also to leave before me. I hope I shall meet them safe again in a better place.

In the year 1815, was received the joyful news of the peace with Great Britain. Until that period, a colonial spirit had prevailed throughout this country, that had checked all efforts at literary enterprise. The successful issue of the war raised our spirits; and our minds took a direction towards literature and science. The news was received about the middle of February. On the 17th of March, the American Philosophical Society, which had been long lumbering, resolved "That a committee of their body should be added to those before existing; to be denominated 'The committee of history, moral science, and general literature.'" This name was adopted on the suggestion of Mr. Rawle, who immediately inscribed his name among the members of the new association.

The business of the committee, (as is usual in such cases,) was carried on by a few. The active members were chief justice Tilghman, (the chairman,) Dr. Wistar, Mr. John Vaughan, Mr. Correa de Serra, Mr. Rawle, and myself, who was the corresponding secretary. Our meetings were frequent, and Mr. Rawle seldom failed to attend. His advice was followed in many instances. The report on the structure of Indian languages, which the committee presented to the society in 1819, when read at our small meeting, received from him several valuable corrections. He felt so interested in the subject, that he entered into a correspondence with me upon it, which the pressure of his professional business did not permit him to continue. He questioned the polysyllabic character ascribed by us to those languages, on the grounds that, as they are not written, it is impossible to know, whether what was called one long word, was not in fact several words combined or joined together. His arguments were ingenious, and in some instances conclusive. Other questions were in this manner amicably discussed between us. I regret that this correspondence was not allowed to proceed farther.

In the year 1820, a society was formed among the judges and members of the bar, called "The society for the promotion of legal knowledge and forensic eloquence." The Law Academy, still existing, was instituted as a branch of it, and under its patronage. The president of this association was chief justice Tilghman; and Mr. Rawle was the vice-president.¹ That society was incorpo-

¹ I hope it will not be thought amiss to subjoin here a list of the officers of that society, as first instituted. Those whose names are in italics are deceased.

President—*William Tilghman.*

Vice-President—*William Rawle.*

Trustees: Charles Chauncey, Thomas Kittera, John M. Scott, *Bloomfield M'Iloins, John Keating, Jr.*

Secretary—John K. Kane.

Treasurer—Benjamin Tilghman.

Provost of the Law Academy—Peter S. Du Ponceau.

Vice-Provost—James Gibson.

See Hall's Journal of Jurisprudence, p. 222.

rated in 1831; and after continuing two or three years, it fell through by an accident; the room in which the election of officers was to have been held, having been found locked, and no election having taken place. It was not revived, and the Law Academy has continued without it.

While that society remained in existence, Mr. Rawle was one of its most active officers. It gave an impulse to legal studies, and to the Law Academy, which has not ceased to operate. As one of the founders and patrons of the latter institution, Mr. Rawle always felt an interest in their pursuits; and as you have remarked, he favoured them in 1832, twelve years after their first establishment, with an interesting and instructive address. He was the friend of youth, and delighted in promoting the progress and advancement of the rising generation.

I have thus, my dear sir, related to you, all the circumstances of Mr. Rawle's life, within my present recollection, which have come under my personal observation, and which are not included in your biographical notice. There may be other facts, which I might have mentioned, but which have escaped my memory. I regret that I have been obliged to speak of myself so frequently in this narrative; but you will easily perceive that I could not avoid it; and indeed I feel no small degree of pride, in finding my name, on this occasion, necessarily connected with that of one whose friendship sheds lustre on all who have had the good fortune to enjoy it.

I am, very sincerely,

Your friend and humble servant,

PETER S. DU PONTREAU.

ART. II.—ALIENAGE.

THE policy of the national government, and of the individual states of the American union, has been to encourage growth of population and cultivation of the soil, by means of foreign immigration. Not only is facility afforded to strangers, by the naturalization laws, for the acquisition of the rights of citizenship, but the enjoyment of property under some restrictions, in most if not all the different states, is insured to such as do not choose to lay aside the distinctive character of aliens.

The want of human agency to develop our natural resources, is felt by us; and as our descent is not exclusively derived from one European stock, that strong national individuality which jealously withholds from foreigners a share of political and social rights, does not exist. The settlement of the country has everywhere been a paramount object of desire, and great-inducements have been held out to strangers to effectuate this purpose, more particularly in the new states. The same policy which has invited cultivation of the soil by actual settlement on the part of the alien, has in many states extended the privileges enjoyed by alien residents, to alien purchasers, without requiring the condition of residence. The permission to hold land untrammelled by restraints, was deemed as tending indirectly to the same end, since no foreigner would presumably purchase real estate without intending cultivation and improvement, either in person or by means of others; and thus the same object has been reached in both ways.

Such, then, being generally our policy, a more particular examination of the acts of Assembly passed in Pennsylvania at different times under this head, may be profitable, by ascertaining how far she has gone, and if there be any and what are the *casus omissi* of her statute books upon this subject. In making this inquiry, we shall have occasion to refer at some length to the similar provisions of the statutes of the state of New York.

A lucid review of the earlier Pennsylvania enactments is to be found in the note to the act of 1807, entitled "An act to enable aliens to purchase, &c.," in the 4th volume of Smith's Laws, p. 364. After the first act, confirmatory of estates derived through alien ancestors, testators, or grantors, it will be seen that between the years 1789 and 1797, different acts were passed by which aliens, not subjects of a power at war with the United States, were allowed to hold land in the freest manner, without restriction as to quantity, and without the necessity of actual residence. Large tracts were in this

way disposed of, when the policy of the state was narrowed, and the act of 12th February, 1795, was suffered to expire without re-enactment. Pennsylvania was for a short period without legislation upon this subject, and governed only by the harsh rule of the common law. But by act of 11th April, 1799, all persons not subjects of a power at war with the United States, *and who had declared their intention of becoming citizens* under the existing act of congress, were permitted to purchase and hold lands as fully as any citizens. The act of congress referred to having been repealed shortly after, by act of 10th February, 1807, any alien in the same predicaments of national derivation from a country at peace with the United States, and of declared intention of citizenship, was allowed to purchase and hold any amount of land not exceeding five hundred acres. By act of 22d March, 1814, sec. 2, a still more liberal policy was evidenced; for by its provisions (temporary it is true in their operation, but lasting in the spirit they manifested), all aliens who on the 18th June, 1812, resided and have since continued to reside in Pennsylvania, and who are the subjects of any state at war with the United States, after having filed a declaration of intention of becoming citizens, may receive, hold, and convey any lands within the commonwealth, not exceeding in quantity two hundred acres, nor in value twenty thousand dollars, as fully as citizens of the United States can do. By the act of 24th March, 1818, it is made lawful for all foreigners not the subjects of some state which is or shall be at the time of the purchase at war with the United States, to purchase from the date of the passage of the act, any amount of land, &c., not exceeding five thousand acres, and to hold the same as fully in every respect as natural born citizens. This act, the restrictive provisions of which in regard to amount are not much more than nominal, and which contains no condition with regard to ~~residency~~, is the last law passed in Pennsylvania under this head, and obviously because no further legislation in this respect can be thought necessary.

From time to time, however, commencing with the second section of the act of 11th April, 1799, provisions were made in favour of aliens who had purchased without falling within the enabling provisions of the different acts, and also confirming the titles they had passed to others in lands so acquired.¹ The more recent act of 24th March, 1818, besides the provisions in favour of purchasers from aliens, confirms the title to all heirs of persons who have died without being naturalized, *provided* that the vested rights of other individuals be not thereby impaired: and the act of 31st March, 1837, the last upon the subject of alienage in Pennsylvania, in addition to the general healing clause acting upon titles acquired by purchase from aliens, extends the provision of confirmation to the devisees as well as the heirs of such aliens, with like restriction in favour of the vested rights of other individuals.

Thus much for the legislation of Pennsylvania upon the subject of *alien purchasers* of real estate. It will be seen that the acts of Assembly now embrace all cases of acquisition of real property, by the act of the alien himself, subject to the above mentioned restrictions that he be a subject of a country at peace with the United States, and that the purchase do not exceed five thousand acres. The only decision to be found in the Pennsylvania reports under this branch of the law of alienage, is the case of *Rubeck v. Gardner*,² in which it was held that where an alien purchased land in 1809, and died in 1812 without having been naturalized and without having made the declaration required by act of congress preparatory to becoming a citizen, his estate did not descend to his heirs at law, but escheated to the commonwealth. By a reference to the acts in existence at the time of the purchase in 1809, it will be found that no authority was given by act of 10th February, 1807, except where a declaration of intention of citizenship had been previously made. As this was not the case here, and as the purchaser was out of the provi-

¹ Act of 20th March, 1811.

² 7 Watts 455.

sions of the first section of the act of 1812, by reason of not being naturalized at the time of his death, the estate escheated to the commonwealth, who granted all their interest in the land to the wife of the deceased, saving such right as any of his heirs might have to the same. Some heirs afterwards appeared, and brought ejectment for the land against the widow's vendee. Their case was clearly not covered by any of the acts prior to the act of 1818, which, as we have seen, in its third section contains a provision confirming the title in all cases where an alien resident shall have purchased or held real estate and shall have died without being naturalized, to the heirs who would have inherited in case of the citizenship of the decedent, and preventing escheat by reason of his alienage. But as it was provided also that no vested rights of others should be divested, it had no room for operation upon the present case. The legislature had conferred the right of the state upon the widow, and she had conveyed to the defendants in the suit, who of course were protected. This was a case of some apparent hardship, but unavoidable under the system of legislation then in existence; and even here we have evidence of the strong wish of the legislature to do away with anything like a forfeiture.

It seems to have been supposed by the legislature that the estate had escheated, *not by reason of the alienage of the decedent, but through failure of heirs to him*; for the plaintiffs, the heirs at law, were then unknown, nor does it appear what degree of consanguinity was existing, although it was not lineal. Under this misapprehension, the commonwealth granted all its interest in the land to the widow, *saving such rights as any heirs of the decedent might have to the same*. But as the title of the state was not on account of a failure of heirs of the first purchaser, but by reason of a defect, namely alienage, in his own title, a complete title was conveyed to the widow, unaffected by the saving clause which had reference to *a supposed right* in some unknown heirs. There could be none, however, in the heirs by reason of the imper-

fection of their ancestor's title, and because of his incompetence to transmit by hereditary descent. The estate of the ancestor vested therefore in the commonwealth at once, without office found; and as its ignorance of the mode the title devolved upon it, could not affect its grantee in a dispute with a third party, the defendants claiming under the widow of course owned a perfect title, which could not be divested by the heirs, on account of the saving clause in favour of vested rights in the act of 24th March, 1818.

In the argument of this case, the act of 23d February, 1791, was referred to in support of the plaintiff's claim; which leads us to consider another branch of the statute law respecting alienage in Pennsylvania.

The acts which have been previously mentioned, exhibit a statutory relaxation of the common law rigour, in favour of those aliens who become owners of land through their own immediate agency—such as are called purchasers in the popular sense of the term. But cases must occur where the title devolves upon the alien without his direct intervention; as for instance where aliens derive their title through a devise or a descent. Legislation was early effected in Pennsylvania to meet such contingencies. By act of 23d February, 1791, it is provided “that every citizen or subject of a foreign state shall be capable in law of acquiring by devise or descent, lands in this commonwealth, &c.” Now as the plaintiffs in the case of *Rubeck v. Gardner* were aliens themselves, it was contended for them that a proper construction of this act vested a title in them to their ancestor's estate, since they claimed by descent as his heirs at law, and were thus within the purview of the law. But the act of Assembly being passed merely to cure defects in the title of the person succeeding, and not of the person under whom a claim was made, was here obviously inapplicable. In the language of the judge (White) who tried the cause below, “it was not their own alienage which barred the recovery of the plaintiffs, but the alienage of their ancestor, whose estate on that account

was not transmissible to his heirs;" and by Sergeant j., who delivered the opinion of the supreme court, "a title by devise or descent is a derivative title; it can rise no higher than its source. The devisee or heir can only take what the ancestor had. But if the ancestor was an alien, and as such incompetent to take, and on his death his property escheated, there was nothing to descend or pass by will."

We have been thus full in our remarks upon this case, both to show the degree of favour the state has always extended to the claims of those standing in any natural relation with a purchaser which gives rise to a presumed equitable demand upon his estate; and because we have here a solemn recognition of the present existence of the act of 1791. It had been said in a note contained in the 3d volume of Bioren's edition of the Laws of Pennsylvania, p. 298, that this act had expired, and part of the note before quoted from in the 4th volume of Smith's Laws, p. 367, contains a refutation of that assertion. But as the full validity of the act of 1791, is here assumed by all the counsel, and by the court *below* and *above*, it will be needless to recur to this objection hereafter, when occasion will again present itself of examining this act more at length.

It is obvious that until the act of 1791, no alien could succeed to an estate in the manner designated by its terms, since the common law always excluded aliens from coming in by act of law. Thus it was decided in the *Lessee of Jackson v. Burns*,¹ that a British antenatus, could not take lands by descent in Pennsylvania. This case is well and fully reported, and inquiry is directed, in passing, to an examination of the reasons which induced the court to their decision. The same doctrine had been previously laid down by the supreme court of the United States in *Dawson's Lessee v. Godfrey*.²

The next case to which attention is called, is the very recent decision to be found in the last volume of the Pennsylvania

¹ 3 Binn. 75.

² 4 Cranch 322.

Reports. In *Reese v. Waters*,¹ it is held that an alien by the law of Pennsylvania, acquires no title in his wife's estate of inheritance, as tenant by the curtesy initiate. The manner in which the point arose, is concisely and clearly stated in the report, whose language we shall adopt. This was an ejectment by Reese against Waters and Achsa his wife, for a tract of land in Allegheny county. Achsa Snodgrass was seised in fee of the land in dispute, and was married to Waters who was an alien. Reese the plaintiff obtained a judgment against Waters, upon which an execution was issued and levied on the land, and an inquisition was held under which it was extended at a certain valuation. The plaintiff sued out a *liberari*, and possession was awarded to him; whereupon this action was brought, and the question was, whether by the law of Pennsylvania, an alien acquired any title in his wife's estate of inheritance, as tenant by the curtesy initiate. The court below held he did not, and the plaintiff took a writ of error, upon which the judgment was affirmed. By the court above, after its being stated that it has been expressly decided (in England,) that an alien cannot be tenant by the curtesy (consummate,), and that the disability which prevents him from being seised in his own right, would equally prevent him from being seised in right of his wife of her freehold, whether of inheritance or not; it is asked, if the disability be removed by the act of 1818, which allows aliens to purchase subject to a limitation as to quantity. It is answered in the negative, because the legislature contemplated a purchase in the ordinary sense of the word, and never meant to stretch their meaning to a technical purchase, which is such only for purposes of classification under heads treated by commentators. It is said also that the authorities show that the verb *to purchase* is not synonymous in its technical sense, if it has any, with the words *to take by purchase*. The opinion concludes with a remark, "that this peculiar disability is not recom-

¹ 4 Watts & Serg. 145.

mended by any principle of policy; and that the legislature would doubtless put an end to the difficulties of the subject, were it brought before them, by cutting up the root from which they spring."

It is assumed by the court, that the defendant was not entitled to be tenant by the curtesy initiate, because the legislature never meant to give the common law fulness of signification to the word *purchase*, which it was argued would embrace his case. It is plain that the decision is put upon this ground, for no other is offered for its support; and we are thus led to infer, that had that extensive meaning been intended by the legislature to the word *purchase*, the defendant would have been tenant by the curtesy initiate, and the judgment of the court given for the plaintiff. The propriety of the reasoning upon which this decision is predicated, may be questioned, although we may give our assent to the correctness of the point ruled. If it be shown that tenancy by curtesy was never at any time ranged under the head of purchase, and that we must look elsewhere for the reason of the decision, perhaps the part of something more than verbal criticism will have been performed; for on this very distinction may depend at this moment, very important rights of many aliens. For instance, the question may naturally be put, if an alien cannot be tenant by curtesy *initiate*, may he be tenant by curtesy *consummate* in Pennsylvania? Can an alien be endowed in Pennsylvania? If so, under what enabling act? If all these inquiries are to be answered broadly in the negative, then immediate legislative interference is loudly called for, since many persons who may have supposed themselves heretofore secure, will find their interests deeply at stake.

In advance perhaps a little of the inquiry under what head tenancy by the curtesy and dower should be classed, though in unison with the scope of this examination, upon which it may help to throw light, some decisions of the New York tribunals may be considered, for discussing which at some length no apology needs be made. It will be seen that the

courts of our sister state have experienced much embarrassment and even disunion upon this score, and that the law is now settled there upon any thing rather than the broad basis of common law principles. The adoption of a rule intended to do equity in a particular case, has resulted in a most distressing entanglement of the cases, and of the principles which should govern cases, without leaving a very intelligible standard for future guidance. The recognition of a peculiar doctrine in the acquirement of title to real estate, commenced in New York about twenty years since, in the case of *Sutliff v. Forgey*.¹ This was an action of dower *unde nihil habet*, to which the plea of demandant's alienage was put in, and replication that demandant was an alien, but that *her husband was naturalized, and purchased the lands in question after naturalization, and during the coverture*; to which the defendant demurred. The judgment of the court upon these pleadings was given for the demandant, which it may be well to look at a little closely. Woodworth j., after premising that the law was well settled, that an alien marrying a subject could not be endowed, and that naturalization merely removed the disability of an alien to hold, but left the state a right to enter, if the naturalized person died without heirs or leaving alien heirs alone, proceeds to state, that a man naturalized holds just as any natural born citizen; that naturalization does not therefore remove the disability of an alien wife to be endowed; and that her right cannot be greater than if the wife of a citizen. After dismissing an argument attempted to be drawn from the act of congress of 1802, which contained a provision in favour of the *children* of a naturalized person, but none embracing the case of the *wife*, the New York statutes are reviewed by the learned judge.

The act of April 26th, 1802, declares all purchases made by an alien becoming an inhabitant, valid to vest the estate to him granted; and that he may dispose of and hold the same

¹ 1 Cowen 89.

to his heirs and assigns. The act of April 8th, 1808, authorized all persons who could acquire land by *purchase*, to take and acquire by devise or descent.

"The demandant had then," proceeds the judge, "the capacity to purchase in 1804, so far as regards her alienage, when the lands were purchased by her husband. By the last act, all persons entitled to purchase, are entitled to take by devise or descent. These words will not include dower. No devise appears to have been made, and the wife cannot take by right of representation as heir at law to her husband. The demandant was authorized to purchase, but a purchase cannot be effected by her except through the medium of her husband. The act must have intended this mode of acquiring, or as to her it becomes a dead letter. . . . The right to dower is an interest in lands. When the conveyance was made to the husband in 1804, this interest was contingent it is true, but it was a right known and recognised by the law, and became absolute on the death of the husband. . . . It cannot, I think, on any principle of sound construction be said, that the demandant is not a purchaser of this right of dower, as clearly as that her husband became seised of the fee. The deed to the husband enured to the benefit of the wife, so far as to secure to her such right in the premises, as she would have taken had she not been an alien. My conclusion is, that the purchase by and conveyance to the husband, constituted the wife a purchaser within the meaning of the act, and consequently, that the demandant is entitled to judgment." Savage, c. j., in delivering his opinion, after stating that the wife of a naturalized citizen had no greater privileges than the wife of a natural born citizen, says, that he is "satisfied that the purchase by the husband enured to the benefit of the demandant, within the equity and spirit of the act. She then had capacity to take an estate. That capacity has never ceased to exist. Her right to dower attached when her husband made the purchase, and she has done no act to divest herself of it. She is therefore entitled to recover."

Now, with regard to this case, it may be remarked in the first instance, that the decision was based upon reasoning entirely different from that employed by the counsel; which is not mentioned as a peculiarity of this case, for it happens not unfrequently, that points are made in the argument insufficient for the support of a cause which is upheld by the court on other and proper grounds. But here one of the arguments advanced had at least the merit of plausibility and of clashing with no common law principle, and claimed a more elaborate refutation than was bestowed upon it; whilst it is difficult to characterize the new doctrine put forth by the court. It was not laid down that tenants in dower were purchasers within the meaning of the term at common law, nor was it perhaps broadly asserted, that under the New York statutes, they would take as purchasers in every case which might arise under those acts; but it was assumed, that as the legislature intended alien females as well as males to acquire by purchase, unless the court adopted this construction, the law would as to the demandant be inoperative. Was this assumption warranted? Doubtless no distinction was intended to be drawn between the sexes, in the acts authorizing aliens to purchase; but was it necessary for the court to go the length they did, to make this intention effective as to females as well as males? All *single women* could avail themselves of the provisions of the act, and thus full efficacy would be given to it; and if a state in life be voluntarily entered upon involving a disability, the legislature is not answerable for the consequence, nor should their action be on that account strained to meet cases not contemplated. But, (passing over the case of a devise, a species of *purchase* provided for by a subsequent act, and which would allow the presumed intention of the legislature to operate upon a married woman,) a feme covert is not disabled from acquiring title to land, even in the most ordinary sense of the word *purchase*. She may purchase, according to Blackstone, following Coke upon Littleton,¹ an

¹ 2 Bl. Comm. 292.

estate without the consent of her husband, and the conveyance is good during the coverture till he avoids it by some act declaring his dissent; and she may herself after her husband's death, disagree or consent to it. Here then is a mode pointed out, by which full room is afforded for the supposed intention of the legislature to act in every presumable case, without holding the wife to be *sub modo* a purchaser as to her dower, which it was admitted she could not be absolutely. If the court thought it their duty to be astute in finding reasons to support the claim of dower, which is much favoured by the common law, they might it seems to us, have drawn more conclusive arguments from the other act of 1808; but as it was, they laid down a principle which the event will show was not very intelligible for the future resolution of similar questions. Indeed, the marginal abstract of the case made by the reporter, (one of the present justices of the same court) informs us under the "*it seems,*" expressive of a lurking doubt in his breast of the accuracy of the doctrine, "that the widow does not take as *purchaser, heir, assign,* or under any other word used by the statutes expressly to designate the person intended to take, but rather under a constructive right as purchaser, within the general spirit and object of those statutes." And we are also informed subsequently in the same syllabus, as a corollary from the law laid down by the court, that "a wife cannot purchase, except through the medium of her husband," which certainly is incorrect according to sir Edward Coke, who expressly says, that she may purchase subject to her husband's dissent.¹

The case of *Sutliff v. Forgey* was afterwards removed to the court of errors, where the judgment was affirmed.² The report of the proceedings is extremely meagre, it being merely stated that the chancellor (Sandford,) and one of the senators, delivered opinions, in which they concurred with the court below, that the demandant took dower as a purchaser within

¹ Co. Litt. 3 a.

² 5 Cowen 713.

the meaning and construction of the act of 1802, and that all the court, except two senators, voted for affirming the judgment.

The next case in the New York reports upon this subject, is the case of *Mick v. Mick*,¹ in the supreme court, which was an ejectment brought in one of the circuit courts by the plaintiff, who claimed as heir of his father. The defendant was the second wife of the decedent a native born citizen, but was herself born in Ireland. The land had been conveyed to her husband in 1823, and in the month of March, 1830, he devised it the defendant, and died shortly after. In June, 1830, the defendant made a deposition of residence and desire to be naturalized, and received a certificate of naturalization. The widow claimed the whole as devisee, or at least one-third as tenant in dower. The verdict was for the plaintiff under the direction of the court, and a new trial was refused, Savage c. j., delivering the opinion of the court against the rule. An abstract of the opinion is made. "The defendant being born in Ireland and not naturalized, was an alien, and as such incapable at common law of taking by descent or other mere operation of law, though she might by purchase or devise, which is a species of purchase, and hold till office found. But the revised statutes make every devise to a person who at the death of the testator was an alien not authorized to hold by purchase, void. The defendant therefore cannot hold as devisee, unless some statute gives her capacity to hold; nor can she have dower, for it is well settled that an alien cannot. The act of March 26, 1802, conferred on alien friends who had become *inhabitants*, the right to purchase and hold, &c. This act was subsequently extended in 1804, 1805, and 1808, to all who had become inhabitants at the close of the latter year, and they might also take by devise or descent. The defendant is not within these acts: 1st, Because not an inhabitant in 1808; 2d, Because *her husband, a natural born*

¹ 10 Wendell 379.

citizen, did not purchase under these statutes. The act of 1825 allows alien widows taking the incipient steps to be naturalized, to hold real estate by devise, descent, or purchase; and by the act of April 15, 1830, any resident alien who had purchased before filing deposition, may hold on filing deposition within one year. In June, 1830, the defendant filed her deposition, and obtained a certificate of naturalization. Had she filed her deposition *before* the death of her husband, then she might have taken; but when her husband died, the estate passed from him to his heirs, when she had no capacity to take; and the statute could not divest an estate vested in the heirs." The correctness of this decision cannot be disputed, but a fallacy in a portion of the reasoning, flowing from the decision in the case of *Sutliff v. Forgey*, is to be pointed out. The second reason given above why the widow could not claim under the legislative acts, is because *her husband was a natural born citizen, and not a purchaser under the statutes*. Surely this could not be the reason why the wife was not entitled to claim, for it is directly counter to the disclaimer made by both the judges (the chief justice himself one,) in *Sutliff v. Forgey*, that the right of the wife of a man naturalized, cannot be greater than of the wife of a native citizen; as well as opposed to the common reason of the law, which could never tolerate that the removal of a disability in the individual himself, should enlarge the rights of one claiming under him, beyond what they would have been if the disability had never existed. Yet the remarks of the chief justice evidently show that he attached importance to the purchase having been made by the husband in *Sutliff v. Forgey*, by virtue of the enabling statutes then in existence. In truth, it was impossible to extract from their opinion what precise rule was established by the court in that case; hence the uncertainty with regard to its application in subsequent cases, until it was moulded into a defined shape in the court of errors, by the talents of an eminent senator.

The whole scope of the rule or supposed rule in *Sutliff v.*

Forgey, was now about to be examined, and the highest abilities and legal discrimination were brought to bear upon the subject. In the case of *Priest v. Cummings*,¹ the question arose upon the following facts. Catherine Cummings brought an action to recover her dower in certain lots. In 1796, the lots in question were conveyed to her husband, a natural born citizen. In January, 1802, the plaintiff an alien, married, and the coverture continued until the husband's death in 1832. The defendant was in possession under a mortgage executed by the husband in June, 1802, which was foreclosed in chancery, and a decree of sale made in 1804. The plaintiff had joined in executing and acknowledging the mortgage, but was a minor at its date. In 1829 she became a citizen of the United States under the acts of congress. Under this state of facts, the court below gave judgment for the plaintiff, which was affirmed in the supreme court. As it was ruled that the execution of the mortgage by the wife, a minor, did not pass her right to dower in the lots, and that although her naturalization was valid, it had no retrospective operation so as to relate back to the coverture in 1802, it became necessary to examine whether under the statute law of New York, she could support her claim. In an elaborate opinion delivered by chief justice Nelson, it was laid down that "the question as to the construction of these statutes was no longer an open one. Their operation has been considered and determined; *and though we might feel some difficulty* in giving our assent to the view there taken, if the statutes were now for the first time to receive our interpretation, we must feel ourselves bound by the decision in *Sutliff v. Forgey*. The only difference between that and the present case is, that *there* the husband was a naturalized citizen; *here* a natural born citizen; both wives were aliens, but both came within the act of 1802 *enabling* them to purchase." The error into which chief justice Savage had fallen in *Mick v. Mick*, with regard

¹ 16 Wendell 617.

to the case of *Sutliff v. Forgey*, is also noticed and ascribed to the inaccurate report of the case in 5 Cowen.

But this subtle principle which had before thus eluded the grasp of both judge and reporter, was not yet destined to be accurately enunciated. The case was removed to the court of errors,¹ where upon solemn argument, the judgment of the supreme court was reversed by a vote of twelve to eight, the chancellor voting with the majority in favour of reversal. The opinion of senator Verplanck (of the majority,) is luminously expressed, and we shall lay before our readers some extracts from it. After asking the question, did Mrs. Cummings' marriage in January, 1802, vest in her a right of dower perfected by the act of March, 1802, and the subsequent acts authorizing resident aliens to purchase, he says, "I am clear she is not within the acts. The highest authorities exclude dower from the head of purchase. I have no wish to disturb *Sutliff v. Forgey*, which was settled in congruity with the views I have taken. That decision rests upon a liberal construction of the statutes, yet I doubt not it is within their spirit and intent, and should unquestionably govern all similar cases. There, seisin of the husband did not give the alien wife dower; but it was buying, it was the conveyance to the husband during coverture, that was held to operate as buying and conveying *pro tanto* to the wife; and to be good as if the conveyance had been made to husband and wife. It was a purchase, according to Woodworth j., effected through the medium of the husband. It is a contradiction to the rule in *Sutliff v. Forgey*, to say that a purchase made by a native citizen six years before marriage, where the marriage took place anterior to the earliest enabling statutes, and where no right of dower vested at that time, can conclude the present case. We cannot presume the legislature intended to make further innovation than the case required. Besides, this would be retro-active; and the retro-active operation of a law is never to be presumed."

¹ 20 Wendell 338.

The rule then, as extracted from *Sutliff v. Forgey* by senator Verplanck, is that an alien wife is entitled to dower only when the land was purchased during the coverture, and whilst she had capacity to take lands by purchase under the statute law. This rule admits of but limited application, and is equivalent to saying, that no case which is not precisely similar in all its features to the original one, shall be considered as falling within its scope. Indeed it is not unapparent that the court were dissatisfied with the decision, and yet from respect to its solemn recognition by the court of errors, were anxious to get rid of it gently by trammelling its operation as much as possible, without absolutely overruling it. The remarks of senator Wager confirm this, who was for sustaining the decision of the supreme court on the principle of *stare decisis*, avowing at the same time his belief that the court in *Sutliff v. Forgey* had mistaken the rule of construction of statutes. The opinions of the chancellor and one of the senators who voted in affirmance of the judgment in *Sutliff v. Forgey*, when brought up to the court of errors, are also referred to by him as proving incontestably that the law laid down there would cover the case now before them.

At length then a principle, though it is submitted an erroneous one, was deduced from the early cases; the great error being in likening the widow's interest as dowager in lands purchased by her husband during coverture, to the interest she would have acquired in the same land if purchased jointly by herself and husband. For what can be more unlike the right of dower in the husband's land, than an estate which in the case of a joint purchase by husband and wife is vested so absolutely in both, that they do not take either a joint estate, a sole, a several estate, nor even an estate in common. From the unity of their persons and marriage, they have the estate entirely as one individual, and on the death of one of them, the entire tenement will for all the estate of which they are seised in this manner, belong to the survivor, without the power of alienation or forfeiture of either alone, to prejudice

the right of the other.¹ Dower is an estate derived through the husband by act of law, and a defect in the blood of the husband prevents the transmission of this estate to the wife. As, if the husband be an alien, the wife shall not be endowed; so where the husband is attainted of treason, although it be treason done after the title of dower, she shall not be endowed.² But it cannot be so of an estate to baron and feme during coverture; for if we turn to Coke upon Littleton further on,³ we find the very case cited from the year-books, to show that treason of the husband cannot affect the estate of the wife so as to forfeit it. It seems plain, therefore, that the reasoning upon which even the limited principle deduced from *Sutliff v. Forgey* is founded, is incorrect.

The case of *Conolly v. Smith*,⁴ in which it was held that an alien widow is not entitled to dower, her husband being at the marriage also an alien and holding land under the act of 1825, enabling aliens to purchase, although he was naturalized at the time of his death, which decision was made in conformity with the rule laid down by the majority of the court of errors in *Priest v. Cummings*, as the wife herself had no capacity to purchase and hold during coverture, is referred to merely to show that legislation in New York has not been very clear upon this much vexed question. For Mr. justice Cowen, who delivers the opinion of the court, says, that the course of legislation has been such, that while it has conferred a right of dower on the resident *alien widow* of an *alien* purchaser, it has denied the same right to the *alien* widow of either a *natural born* or *naturalized citizen*, unless she file the proper deposition. It may indeed be doubted if his conclusion in this respect be correct; since the act to which he refers⁵ only says, that "the widow of an alien who at the time of his death shall be entitled to hold, if she be an inhabitant of this state at the time of such death, shall be entitled to

¹ Preston on Estates, p. 131.

² 21 Wendell 59.

³ Co. Litt. 31, a.

⁴ Ib. 187, b.

⁵ 1 R. S. 733, sec. 2.

dower in the same manner as if such alien had been a native citizen." Now here the only reference is to the alienage of the husband; and the wife must be supposed capable in other respects of being dowerable, which would not be the case were she herself an alien. If, however, the construction given by judge Cowen to the statute, is the right one, then an ability is bestowed upon widows of aliens, not enjoyed by widows of citizens either by birth or adoption.

But to return to the question, under what head tenancy by curtesy and dower should be distributed.

From what has been already gathered from the cases cited, it would seem clear that they cannot be classed under the head of purchase, even in its largest common law acceptation. Let us briefly review the authorities. Littleton, in section 12, defines purchase to be the possession of lands or tenements that a man hath by his deed or agreement, unto which possession he cometh not by title of descent from any of his ancestors, or of his cousins, but by his own deed. Lord Coke remarks upon this passage, that a purchase is always intended by title, and most properly by some kind of conveyance either for money or some other consideration, or freely of gift; for that is in law also a purchase: and in his note Mr. Hargrave tells us that in Plowden 11, Saunders arguendo says, that one may have land by purchase three ways—by bargain or gift for money, by gift without any recompense, and by way of remainder; which last division, however, is included in the two former. So far there can be no difficulty. Blackstone,¹ it is true, says, that purchase includes every other method of coming to an estate, but merely that by inheritance; yet in his enumeration of what titles are embraced by it, he makes no mention of curtesy and dower, although he includes *escheat* under this head. But he seems afterwards dissatisfied with having gone so far, and subsequently says that the lord by *escheat* is more frequently considered as being *ultimus hæres*,

¹ Bl. Comm. vol. ii. p. 241.

and therefore taking by *descent* in a kind of caducary succession. To bring the law down to a very recent period, chancellor Kent in his *Commentaries*¹ defines purchase to be the acquisition of land by any lawful act of the party, in contradistinction to acquisition by operation of law; and it includes title by deed, title by matter of record, and title by devise.

We have thus ample authority for the exclusion of the conclusion that curtesy or dower are to be regarded as branches of the head of purchase. None of the above definitions can be strained that far without violence; for although it may be argued marriage is a state contracted by the act of the parties themselves, and that curtesy and dower as incidents of this state are therefore a species of purchase, yet as has been well observed, though the marriage is a voluntary contract, the parties come to curtesy and dower by act of law.² A distinction it is true has been made between tenant by curtesy (all authorities agreeing that he is in by the *post* or directly by the law of the land) and tenant in dower, who is said to be in by the *per*,³ yet some of the authorities even place her on the same footing; and those which do not, admit that although in by the *per* by the baron, yet she is in by the law without the act of the baron.⁴

But this doctrine is not merely inferential from negative authority. Sir E. Coke, after his definition of a purchase, says that a descent, because it cometh by act of law, is not said to be a purchase, &c. And so it is of an escheat or the like, because the inheritance is cast upon or a title vested in the lord by act in law, and not by his own deed or agreement, as our author here saith: *Like law of the state, of tenant by the curtesy, tenant in dower, or the like.* A more express and positive denial of either of these estates being in any respect a species of purchase, could not be met with, and the application of this doctrine to the subject matter of these remarks is now to be made.

¹ Kent Com. vol. iv. p. 440. ² Park on Dower, p. 102. Law Library, vol. xi. p. 47.

³ Co. Litt. 30 b. note 177. ⁴ Park on Dower, p. 342. Law Library, vol. xi. p. 156.

The act of 23d February, 1791, before alluded to, stating in its preamble that "it is proper that persons purchasing lands in this state may transmit their possessions to their children, relations or friends, who may still remain in and be subjects of foreign states," provides by the first section, that "every person being a citizen or subject of any foreign state, shall be able and capable in law of acquiring and taking by devise or descent lands or other real property in this commonwealth, and of holding and disposing of the same in as full and ample a manner as the citizens of this state may or can do; and no such lands so held by devise or descent, shall escheat or be forfeited to the commonwealth for or on account of the alienage of such person claiming the same under any last will, or succeeding thereto, according to the laws of this commonwealth." If then, descent in its largest signification, will include dower and curtesy, when consummate by the death of the correlative in the marriage state, will the fact of their devolving upon aliens prevent their vesting, or are they not saved by the terms of this act of Assembly?

That at common law but two modes of acquiring title to land were recognised, viz. descent and purchase, under which all other titles were distributed, cannot, it is thought, be disputed. This may be inferred from Littleton,¹ where but these two ways are pointed out; and more directly from the commentary of lord Coke, who likens the estate of the lord by escheat and the state of the tenancy by the curtesy and dower, to descent. The note of Mr. Hargrave² is strongly confirmatory of this; for after remarking that an escheat in appearance partakes of the nature both of a purchase and a descent—of the former, because an act of the lord is necessary to perfect his title; of the latter, because it follows the nature of the seignory, and is inheritable by the same persons—he says, that in strictness it should fall under neither head, for reasons which he then gives, and proposes a new head of title by act

¹ Littleton, sec. 12.

² Co. Litt. 18 b. note 106.

of law, to which descent, escheat, and dower and curtesy may be referred, leaving the head of purchase to include all other means of acquiring real estate. Now unless by the old division all titles had been classed under descent and purchase, these remarks would have been uncalled for and pointless; nor would Serjeant Stephen in his recent Commentaries¹ have said, "the acquisition of an estate in land is commonly said to be either by descent or purchase (these being the principal methods) but more accurately speaking, it is by act of law, or act of the party," citing this note of Mr. Hargrave's as authority. In *Priest v. Cummings*,² the chancellor says, that "according to the doctrine of the feudists, interests in land were divided into but two kinds, *feuda antiqua* and *feuda nova*, which are defined to be those to which the possessor succeeds as heir to his ancestor, and those which he has acquired in some other way."³ In the first case, the possession is seised by descent, but in the latter by conquest, *perquisitio* or purchase."

All the authorities exclude dower and curtesy from *purchase*, and those who confine *descent* to the single case of the heir's succession to the estate of his ancestor, are compelled to seek a new title—act of law—which will include all the other cases. But Hargrave we have seen, says, that *escheat* partakes of the nature of a *descent*, and Blackstone avows that the better opinion is, that the lord by escheat takes as *ultimus hæres*, by a kind of caducary succession; and some reasons may be offered why dower and curtesy may with equal propriety fall under this head, independently of the common law division. A defect in the blood of the husband, as for instance treason, committed by him, or alienage rendered the wife incapable of being endowed; whilst a defect in the blood of the wife herself, as treason or alienage, worked the same result, and precluded this estate from vesting. But

¹ Steph. Comm. vol. i. p. 353.

² 20 Wendell 319.

³ Sanf. on Herid. Suc. 30. Beame's Glanvil, 143.

this is a cardinal rule regulating descents of inheritance; for a defect either in the blood of ancestor or heir, prevented the descent. As a further evidence that the right to claim dower followed strictly the title to the inheritance, where after the attainder of treason, the husband procures a charter of pardon, his wife will it seems be dowable of all lands of inheritance of which he becomes seised after the charter of pardon; for as Perkins observes, "notwithstanding that she was wife at the time of the attainder, yet the issue which the husband might have had by her after the purchase of his charter of pardon, is inheritable."¹ Dower and curtesy, it is true, attach upon all lands acquired during the coverture, and are said to be initiate by the marriage, remaining as an incumbrance upon the inheritance, the death of the husband or wife respectively perfecting the estate. But under the ancient feudal rigour against alienation, the heir had something of this inchoate right in the land of his ancestor, which he could not be deprived of; nor until the statute of Wills, could the owner of the inheritance devise it from the heir at common law. Again, in the case of *Summer v. Partridge*,² it is said, that in curtesy and dower, the estate comes out of the *inheritance*, and not out of the *freehold*: they are excrescences out of the *inheritance*, and a continuation of the *inheritance* for a certain time in the husband and wife, which would otherwise have ceased. Here, then, is a succession—by tenant in dower or by curtesy—to the inheritance, by act of law:—is this any thing else than a species of descent?

In Pennsylvania, high authority is not wanting to support this proposition. The first case of that able series of reports bearing the name of Mr. Binney, decides that the curtesy estate of the husband in the lands of the wife, is not forfeited to the commonwealth for the life of the husband by his attainder for treason committed in his lifetime and after issue born; but the wife's estate is discharged from the curtesy.³

¹ Park on Dower, p. 221. ² 2 Atk. 47, cited in Park on Dower, p. 173.

³ *Lessee of Pemberton v. Hicks*, 1 Binney 1.

This case hinged entirely upon the point whether the curtesy actually vested during the life of the wife. It was conceded that for some purposes, the husband after issue born was regarded as tenant of the freehold, e. g. he should do homage alone, and become tenant to the lord by the old feudal law, and he might make a feoffment in fee without forfeiture; yet this was put upon the ground, not of his estate then vesting, but of his having a seisin in fee in right of his wife; for had he been mere tenant for life, his feoffment in fee would clearly be a forfeiture. Yeates j., in delivering his opinion against the forfeiture, says, "it is fully settled that tenants by the curtesy and in dower, come in by *descent* merely by act of law,"¹ referring to the passage before cited from Co. Litt. 18 b., and thus stamping the conclusion attempted to be drawn in these pages, with the authority of his judicial character. "Now," continues he, "in all cases (except entails) attainder of treason or felony, corrupts the blood upwards and downwards, so that no person that must make his derivation by descent to or through the party attainted, can inherit. Why is this reasoning by analogy to the case of an inheritance, pursued? It is made clear by the next paragraph. "Here then, as to the husband, the vinculum of *descent* was destroyed by his political offence; by his own voluntary act he has shown himself an alien in affection. He therefore shall not be admitted to the legal right of *descent*; his title shall never arise even for the benefit of the commonwealth; and the estate of his late wife, shall be discharged forever of his claim." We have thus the term *descent* applied three times on one page to the estate of tenancy by curtesy consummate, by one of the ablest lawyers Pennsylvania has ever produced; and we might rest upon this as ruling the matter, so far as the opinion of a great legal mind is to be regarded upon a point not directly before him, to be sure, but immediately in his view. But on page 17 of this case, we find the following

¹ 1 Binn. p. 16.

language: "It appears therefore that Joseph Galloway (the husband) was legally incapable of taking the premises in question after the decease of his wife, by right of *descent* as contradistinguished from *purchase*: his claim was intercepted by his attainder, and could not take effect by his civil death, any more than if he had paid the common debt of nature." A more direct recognition of the point it would be in vain to search for; and if we consider that this case was solemnly argued three times, and that one of the court (judge Smith) dissented, it may well be regarded as a beacon light for future guidance where this doctrine is involved.

But what are the authorities that clash with this view of the title by curtesy and dower? The opinions of the text writers who assert that a more proper division of the head of title would be into title by act of law and by act of the party, prove nothing against the existence of the old division, but all are authority in favour of it. Some of these commentators besides, admit *escheat* to be a kind of descent, and reasons have been before given for extending the same favour to curtesy and dower. In *Sutliff v. Forgey*,¹ it is true the court held that the word *descent* employed in the act of the legislature, would not include dower; but the reason given was that the wife could not take by representation as heir to the husband. We have endeavoured to point out how tenants by curtesy and dower do succeed, which is not assumed to be in this mode, but by having the inheritance cast upon them by act of law. We may therefore fairly suppose that the question did not receive from the court a full consideration, pre-occupied as they were with a peculiar view of the case, upon which they finally gave judgment for the demandant. In the case of *Buchanan v. Desbon*,² an alien widow who was a French citizen, claimed dower by virtue of the convention with France, which gave a capacity to *inherit* in the United States to the citizens of the French republic. The court of

¹ 1 Cowen 89.

² 1 Harr. & Gill 280.

appeals of Maryland say, "it is doubtful whether by the most liberal construction, the clause could extend to the claim of dower; but they go on to examine whether the treaty was yet in force, and finding that it had expired before the death of the husband, declare that it cannot avail the wife." Here the term was narrowed down to the smallest application of the word descent, designating only the relation between heir and ancestor, yet the court doubted sufficiently to deem it proper to make an inquiry into the present existence of the treaty. This then can be considered no authority against curtesy and dower belonging to the head of descent, but if it establish anything, is rather favourable to this view. We are aware of no other authorities upon this point; for *Reese v. Waters*¹ proves nothing, as the husband was still alive.

The act of 1791 may perhaps afford another argument in support of the right of alien husbands and wives to curtesy and dower consummate. In the conclusion of the first section, it is enacted, that "no such lands or estate so held by devise or descent, shall escheat or be forfeited to the commonwealth for or on account of the alienage of such person claiming the same under any last will or succeeding thereto, according to the laws of this commonwealth." There can be no question that the husband and wife succeed to curtesy and dower according to the laws of this commonwealth. These estates are derived either from that part of the common law which the original settlers brought with them from England, as applicable to their condition in the newly acquired territory of Pennsylvania, or perhaps as regards dower, in case of intestacy, from the statute law of the land. In construing a statute, the old law, the mischief and the remedy, are all to be weighed in giving efficacy to the enacting words. The act of 1791 is entitled, "a supplement to the act to declare and regulate escheats," of September 29th, 1787, and was passed in modification of the rigour of the original act, to

¹ 4 Watts & Serg. 145.

prevent escheat by reason of alienage, where any person at the time of his or her death was seised or possessed of real or personal estate, &c., and should die intestate, &c. All estates therefore, accruing upon the death of the intestate, were within the mischief, to remedy which the supplemental act was passed; and such a construction as the words will bear, must be made to carry out the intention of the legislature. Now, supposing that the term descent can only include the estate cast upon the heir, the words "succeeding thereto, &c.," are ample to embrace dower and curtesy, and where the legislature has in the conclusion of the section adopted a generality of language by which full efficacy can be given to its presumed intention, we should not restrict it by the previous words, "no such lands held by devise or descent." And as a proof of the favourable construction the courts have made of an act of Assembly where the rights of aliens are at stake, *Stewart v. Foster*¹ may be cited, in which it is held that an alien who had resided in Pittsburgh one year preceding an election for borough officers, and had within that time paid a borough tax, is entitled to vote.

The intestate act of Pennsylvania in case of the death of the husband without children, gives the widow one-half of his real estate for life, and one-half of his personalty absolutely. What is the character of this estate of the wife? Is she not in by descent strictly as heir to her husband, the legislature substituting the close affinity of the marriage state, for the consanguinity required at common law? If this assumption be correct, what results from it? If dower or the widow's thirds may not appropriately range under the same head of descent, in what predicament is an alien widow placed? Must she take the whole of this half, where she could not take a third if the husband had left issue? or must the legislative bounty be split up into two fragments—two-sixths being denied her, because of its being dower, which

¹ 2 Binn. 110.

alienage incapacitates her from receiving, the remaining sixth being left to devolve upon her by descent through the legislative provision? Or, suppose the husband to leave children but to die intestate. In such case, dower may be said to be gone by the intestate act. The provision given to the wife is said expressly to be in lieu and full satisfaction of dower. If this be correct, (under the previous supposition that this would be a species of descent, although dower would not,) the alien widow of an intestate would find a provision which is denied to the alien widow of a man dying testate, without a special devise to his wife, leaving her to her dower at common law.

It may be asked, if an alien then is entitled to curtesy or dower in Pennsylvania under the act of 1791, where does this incumbrance attach, and may an alienation be made during coverture by the citizen, husband, or wife, without the concurrence of the alien correlative? Probably, under the decision in *Pemberton v. Hicks*, and *Reese v. Waters*, it would in no case be necessary for the alien husband or wife to unite in the conveyance, though prudent counsel would not advise such a course as might leave a title open to doubt. For independently of the act of 1791 being held to include these estates, what would be the effect of the naturalization of the alien? Would the right to dower or curtesy retroact upon all estates acquired and aliened during coverture? or would naturalization have merely a prospective operation? The subject is an interesting one, and not without difficulties either way, and has been already discussed in the New York tribunals.

It may be gathered then from what has been said, that unless the provisions of the act of 1791 embrace the case of alien tenants in dower and by curtesy, these estates can have no existence in Pennsylvania. It cannot be presumed that the rule in *Sutliff v. Forgey*, opposed as it is to sound common law principles, will be adopted here even in the limited number of cases upon which it can operate; and if this be therefore a *casus omissus* in our statute books, it certainly requires prompt attention on the part of the legislature.

ART. III.—PERSONAL HEREDITAMENTS.

ALTHOUGH this subject is rather one of curiosity than practical utility, we venture to lay some researches and views before our readers,

Annuities and offices in fee-simple, (if the latter exist at all,) are of very rare occurrence in this country. Still as they are recognised in the common law, there is no reason why they cannot be created here.

The arguments presented, and analogies drawn, will apply equally to all personal hereditaments. To avoid repetition, and for the sake of simplicity, the discussion will be confined to the case of Annuities in fee.

An Annuity in fee strictly taken, is a yearly payment of a certain sum of money granted by one person for himself and his heirs to another person and his heirs, charging the person of the grantor only.¹

Is the interest of the grantee in this case real or personal estate?

Although the subjects in which men may enjoy an exclusive property, are divided in the common law into real and personal, the most approved text books of the student fail to present a clearly defined line of distinction between them.

The decisions of the courts have settled that line, and later elementary writers have acted upon those decisions.

We might say in general with truth, that the rules regarding succession, limitation, alienation and incumbrance, are different in real from personal property. In the one, the heir in his own right immediately succeeds; in the other, the executor as a trustee for the next of kin, who may be—often is—the same person as the heir. A much shorter period of limitation

¹ 1 Bacon's Abr. tit. Annuity.

in general bars the recovery of personalty, than realty. More exact and solemn form is required in the alienation of the one, than of the other. While liens on the real estate are encouraged and multiplied, those on the personal are few and simple, and restrained to the goods in the possession of the lien-holder.

There are many things falling within the accepted definition of personalty, which by a fiction under certain circumstances, are considered as real, and attach to themselves all the attributes of realty, e. g.: Heir looms. *E contra*, certain fixtures really annexed to the soil, and forming part of the structure thereon, for the benefit of trade, bear the character of personalty.

In equity, a direction given by the owner to land will convert it into money; and with that stamp upon it, it will have all the characteristics of money, and *vice versa*. The proprietor may by his simple election, restore it to its original and natural condition.

At law too, as we shall presently see, there is certainly one instance, and there may be more, in which the same subject-matter by the act or election of the owner, and without any change in the thing from real, may become personal.

An interest in realty by being mingled in an undistinguished mass of property, held in common with personalty, has the latter character impressed upon it. Thus, shares of stock in a bank or other incorporated company, are personalty without reference to the nature of the subjects in which these shares give an interest. This is the general doctrine of American law.¹ In England, shares in companies associated for the purpose of acting on land exclusively, as rail-road, canal and turnpike companies, are real estate.² It saves confusion, however, to consider the share as a transmissible and assign-

¹ 2 Kent Comm. 341, note.

² 2 P. Wms. 127. 2 Ves. Jr. 651. It is so held in Kentucky also. Price v. Price, 6 Dana's Rep. 107.

able franchise of the personal kind, giving the proprietor a right to his proportion of the profits in money, in the shape of annual dividends, and to a return of his capital in money, upon dissolution or expiration of the charter. The fact that the incorporation itself is only for a term of years, has no influence upon the character of the estate it may hold in any species of property. A body chartered but for a single year, or a less period, will take a fee-simple by a grant to them and their successors, and may hold and grant over such an estate, if they have a sufficient license in mortmain. Upon dissolution, it reverts to the original donors, who in the case supposed, are the subscribers to the stock or their assigns. It is more simple and natural, therefore, to regard the interest of a stockholder as a right to a return of his proportion of the capital in the same shape in which he invested it.

By the civil law, *bona mobilia* and *bona immobilia*, are the *membra dividenda* of all estates; so that as *bona immobilia* are land, *bona mobilia* include all personal property.¹

Moveables are all things which can be transported easily from place to place without being deteriorated. They follow the person of the owner wherever he goes, and are subject to the law of his domicil.

Immoveables are such as have a fixed situation, and are governed by the *lex rei sitæ*.

There are some subjects of property, which without having a material body, nor a fixed site, are still classed as immoveables, such are *cens*, *rentes foncières*, *servitude*, &c., yet these are *droits réels*, and properly denominated from the matter out of which they arise, or to which they are attached.

By a fiction also in a few cases, a moveable may be considered as an immoveable, where the thing has changed its character from immoveable to moveable, without the act and will of the proprietor, and where injustice to third parties would otherwise result. Thus, the materials of an edifice

¹ 1 P. Wms. 267.

demolished belonging to a minor, the money arising from the sale of his heritage, or the *remboursement* of a *rente* belonging to him, are considered as immoveables in regulating the succession to his property.¹

A moveable may become an immoveable in two ways: *by incorporation*, or *by accession*.

By incorporation, when it is attached to the realty by cement, or in any other manner, so that it cannot be separated without injury either to it or to the realty.

By accession, many things become parts of a house though not attached to it, as padlocks, keys, &c., for all that is in a house for perpetual continuance with it, is a part of it.

Things detached from a house in the course of being repaired, to be replaced in it, are immoveables. Things intended for the building of a house, but not yet placed in it, are moveables. *Ea quæ in ædificio detracta sunt ut reparentur, ædificii sunt: at quæ parata sunt ut imponantur, non sunt ædificii.*

Obligations and actions are sometimes moveable, and sometimes immoveable, according to the nature of the thing from which they arise.

If it is the claim of an immoveable which they have for their object, they are immoveable. If it is the acquisition, delivery, or claim of moveables, to which they relate, they are moveables.

It is to the class of moveables belong interests in moneyed corporations, and perpetual or life rents, whether from the state, or from individuals. But this class is susceptible of two modifications by the French code.

1. Perpetual rents or annuities from the government may be made immoveable for the purpose of creating or endowing a *majorat*.

2. In like manner, the shares in the Bank of France may be rendered immoveables to all intents.

The shareholders who wish it, have the power of giving to

¹ Encyclopædie Francaise. Meubles.

their share the quality of immoveables; and it must be done by a declaration in the form prescribed for transfers.¹

Sir William Blackstone, deservedly the most popular commentator on the laws of England, defines "things real" to be "such as are permanent, fixed, and immoveable, which cannot be carried out of their place, as lands and tenements," and "things personal" to be "goods, money, and all other moveables which may attend the owner's person wherever he thinks proper to go."²

Though the illustration thus given of things real is confined to "lands and tenements," yet immediately afterwards on the same page, when he comes to speak of them "with regard to their several sorts or kinds," he distributes them under the heads of "lands, tenements, and hereditaments." Chancellor Kent commences his lecture on Real Property, (succeeding an introductory on the Foundation of Title to Land,) with this sentence: "Things real consist of lands, tenements, and hereditaments."³

Both these justly celebrated writers have placed under the head of hereditaments,—offices, franchises, and annuities.

Lord Coke, whom they cite, is more accurate. He does not profess to give a definition or description of real property. After a long and elaborate dissertation on the names by which things will pass in feoffments and grants, he winds up with the general and comprehensive terms, "lands, tenements, and hereditaments;" which last he informs us, is the largest word of all in that kind, for that whatever may be inherited, is an hereditament, be it corporeal, or incorporeal, real, personal, or mixt.⁴

In a previous page, he had taught that *real* hereditaments were lands and tenements; *personal*, mere personal privileges, franchises, offices, and annuities; and *mixt both of the realty and personalty*, dignities, franchises, and offices annexed to or concerning land.⁵

¹ Repertoire de Jurisprudence. Meubles.

² 2 Bl. Comm. 15.

³ 3 Kent Comm. 401.

⁴ 1 Inst. 6. a.

⁵ Ib. 1 b. 2 a.

There is no warrant in any word of lord Coke's, for classing personal hereditaments with real estate.

Mr. Woodeson in his Vinerian lectures, has followed Blackstone, and even still more broadly. "The great division of property established by the laws of England," says he, "and which ought to be constantly and attentively remembered, is into things real and things personal: these are respectively the subjects of very different regulations, and as it were of distinct systems of jurisprudence. Every species of things real, is comprehended under the word 'hereditament,' signifying whatever may be inherited in a course of descent, whether of a corporeal or incorporeal nature."¹

Mr. Preston in his Treatise on Estates, with more caution, gives us no definition of real property, but tells us generally and correctly, that "land in its several species, viz. arable, meadow, pasture, &c., and houses and other edifices thereon, and interests arising or issuing out of and being collateral to land, as rents, commons, &c.; and personal duties, as annuities, offices, and privileges, as stewardship, &c., are the subjects of property in which estates exist."²

Yet this very accurate writer says afterwards: "An annuity for life is neither land, tenement, nor hereditament:"³ as though this could be predicated of it alone. If an annuity were a thing real, or real property, it would be so; but if it be mere personalty, the same might with equal truth be affirmed of any chattel—a table, a ship, a term of years, or a bond.

According to Mr. Cruise: "By the law of England, property is divided into two kinds, namely, real and personal property; which kinds are governed by distinct systems of jurisprudence. Real property consists of land, and of all rights and profits arising from or annexed to land, which are of a permanent and immoveable nature; it is usually comprised under the words, lands, tenements, and hereditaments."⁴ Again: "Real property is corporeal or incorporeal. Corpo-

¹ 2 Woodes. 4.
VOL. II.

² Preston on Estates 7.

³ Ib. 12.

⁴ 1 Cruise Dig. 1.

real property consists wholly of substantial and permanent objects, all of which may be comprehended under the general denomination of *land*. Incorporeal property consists of rights and profits arising from or annexed to land."¹

Mr. Cruise appears to have given a very accurate account of real property. It is manifest also from his having omitted corodies and annuities in his titles on incorporeal hereditaments; though he does not give it as a reason, but only that they "are not deserving of a particular discussion."² That he still kept up the true distinction in his mind, is evident from what he says of offices, in his title upon that subject. "All offices relating to land, or exercisable within a particular district, are incorporeal hereditaments of a real nature, and are therefore classed under the general head of real property."³

Humphreys, in his work on real property, tells us that "this species of ownership is considered in the laws of England as comprising not only land with the erections and other improvements upon it, all which are called *corporeal*, but also various *rights* derived *out of it*."⁴

So Burton on the same title says: "The subjects of real, as distinguished from personal property in England, are commonly included under the general denomination of lands and tenements; and they are indeed *all* comprehended in the latter of these two words."⁵ "The word hereditament is still more comprehensive, for it is applicable not only to lands and tenements, but to some of the subjects of personal property, and to mere rights which imply a privation of property."⁶

Sir Richard Pepper Arden, in *Buckeridge v. Ingram*,⁷ has given a definition of real property, which has been followed by the supreme court of Pennsylvania in the case of *Meason's estate*.⁸ "Wherever a perpetual inheritance is granted, which arises out of land or is in any degree connected with it, or as it

¹ 1 Cruise Dig. 2. ³ Ibid. 2. ⁵ Ibid. 132. ⁴ Humphreys on Real Property, p. 8. ⁶ Burton on Real Property, p. 1. ⁷ Ibid. p. 2.

² 2 Ves. Jr. 651.

⁸ 4 Watts 346.

is emphatically expressed by lord Coke, exercisable within it, it is that sort of property which the law denominates real property."

This definition, though true as far as it goes, and much better than any that have been heretofore referred to, is not sufficiently extensive. There is certainly no reason for confining it to the case of a "perpetual inheritance." Surely an estate for life in land is real estate. It is not every interest in it which is. A chattel real is personal.¹ It will not do to substitute "interests for an indefinite or uncertain duration," for the words "perpetual inheritance" without more; because the estates of tenants by *statute merchant*, *statute staple*, and *elegit*, though of this character, are chattels, and not freeholds.² A mortgage, though giving an interest in real estate on its face even in fee-simple, and which may by proceedings at law or in equity be converted into real estate, is nothing for all practical purposes but a chattel. It is to be remarked, however, that these instances are all cases in which the estates are held as mere security for debts, and follow the nature of the debts to which they are accessory.

There is a distinction to be observed and borne in mind between things real and real estates.

Things real are land, structure thereon, fixtures thereto, and rights issuing out of, annexed to or exercisable within land. There may be a personal estate in a thing real—as a term of years, a mortgage, &c.

Real estate is such an interest, not held as merely collateral to a debt or personal duty, in a thing real as is of uncertain duration, and which by possibility may last for a life. There cannot be a real estate in a thing personal. Interests of so large a character in things personal as for life, at common law, vested the absolute and entire property in the first taker, and effect was denied to limitations over. An exception arose in the case of a limitation by will, which was held good

¹ 3 Kent Comm. 401.

² 2 Bl. Comm. 162.

as an executory devise. Now through the medium of trusts, as secure provision may be made in future for the issue of a marriage by the settlement of personal as of real estate.¹ Still all estates and interests in personalty are personalty.

The definitions which have been attempted and the remarks which have been made, show that an annuity is a thing personal, and there can be in it nothing but a personal estate. It is true that this contradicts sir William Blackstone, who lays it down that a man may have a real estate in an annuity, though his security be only personal.² For this, however, he cites no authority. The only semblance of authority is in some very old cases, in which the assignability of an annuity was discussed. Having perpetual continuance, the better opinion seems to have been, that it could be assigned, provided the consideration was executed and the word *assigns* contained in the grant; neither of which circumstances would be of any account if it were real estate proper. It never, however, was expressly decided; though in a note by Mr. Hargrave to 1 Inst. 144, b., he considers the question of its assignability settled by *Gerrard v. Boden*.³ It is true an opinion that way was expressed by the court in that case, but the case was compromised, and there was no judgment given. He questions whether naming *assigns* is essential, the principle of the objection being the same whether assigns are mentioned or omitted. That objection, he admits, "in strictness of law carried force with it." He adds: "However Perkins, in the special case of an annuity *pro consilio impendendo*, requires naming of assigns."⁴ Even then, too, he questions the annuity being assignable. But this was settled in Maund's case,⁵ one point resolved being that express words would make such an annuity assignable." But with great deference to Mr. Hargrave's name and authority, Maund's case was the case of a *rent charge*, and arose upon a replevin of a dis-

¹ 2 Kent Comm. 352. Hargrave's note to 1 Inst. 20, a.

² 2 Bl. Comm. 46.

³ Hetl. 80.

⁴ 3 Perk. s. 101.

⁵ 7 Co. 28, b.

tres for the same rent and an avowry in court, by which the person of the grantor was forever discharged. Bro.¹ sustains Perkins, for it is there said, "Nota per Catesby justice, if a man has any annuity by general grant or by prescription, he may grant this over, although it be in manner a chose in action, but otherwise of an annuity granted *pro consilio impendendo*." Nor is Baker v. Broke² (sometimes cited), a full authority, for though the thing granted is there called an annuity, the action was debt for arrearages; and by the terms of the grant, it was *pro bono consilio ante tunc impenso, exeunt' de rectoria sua de Bosworth*: so that it was a rent; for until election it is to be so considered: and it is only by the writ of annuity that the election is made, and not by any other personal action: We have the whole matter very concisely and fully presented in Brooke.³ "It was doubted if he who has an annuity in fee can grant it over, for it is a chose in action; nevertheless, by others it is an inheritance, and therefore can well be granted over, and this without attornment, for it charges the person. And debt cannot descend to the heir, but annuity of inheritance can descend to the heir, therefore not mere personal." This is Mr. Woodeson's authority for saying that the assignability of an annuity is rested on the ground of its amphibious nature, and its not being mere personalty.⁴ Taking it for settled that an annuity is assignable, it does not follow that it is not personal. If it proves any thing, it only proves that it is not a chose in action. Properly speaking, perhaps the annuity itself does not lie in action; for it is a question whether debt or annuity lies, unless arrearages are due and unpaid. It is not like a bond payable in future. There there is a *debitum in presenti, solvendum in futuro*. In annuity, there is no present subsisting debt or duty; the debt or duty accrues only as the times of payment elapse. It cannot be pretended that any thing but the arrearages would be proveable in bankruptcy, or barred

¹ Tit. Annuity, p. 37. ² Mo. 5, n. 18. ³ Annuity, pl. 39. ⁴ 2 Woodes. 75, note.

by the certificate. In Brooke¹ we find it said, "that a release of all actions personal is a good plea, although the annuity be to the plaintiff and his heirs. And the same law of actions real, for it is mixt, quære therefore." And Fitzh. tit. Release, 48, is referred to. In Diggs' case, however,² there was the grant of an annuity in fee, and on the day of the first payment the money was paid, and the grantee made to the grantor an acquittance, and at the end of it released all actions. After the next payment in arrear, the grantee brought a writ of annuity. And it was held that until there is something in arrear, the action is not maintainable. Although the judgment in a writ of annuity be to recover the annuity *imposterum*, and on this judgment the grantee shall ever afterwards have his *scire facias* to recover the arrearages as they fall, yet *rien in arrear* is a good plea, and issuable. Anderson, c. j., said, that an annuity is a thing personal, for which the grantee has no remedy but by action; nevertheless it is not a *chose in action*; for there are some things for which there is no remedy except by action, and yet they are not choses in action, as for a rent seck there is no remedy but by assise after seisin, and yet such a rent is not a *chose in action*. The judgment, therefore, was against the release. It is to be observed, that this determination overruled the case in Fitzherbert, and a case in 21 Ed. 4, where chief justice Bryan had held that a release of all actions personal was a release of an annuity. In *Doctrina Placitandi*³ (in regard to which book the law student hardly need be reminded of the remark of chief justice Willes,⁴ that there was more law learning in it than any book he knew, that it contained the substance of all the pleadings in the year-books and Coke's Reports), it is laid down however, that "In annuity by prescription, *rien arrear* is a good plea; otherwise, if he declare on a deed"—which seems to strike at the very foundation of the case in Moore.⁵ In *Bodvell v. Bodvell*,⁶

¹ Annuity, pl. 43. ² Mo. 133, n. 279. ³ Page 36, tit. Annuity. ⁴ 2 Wilson 88.

⁵ See Bro. tit. Annuity, pl. 31, citing 5 H. 7. 33.

⁶ Jones 214.

there was an annuity by plaint brought in the great sessions of the county of Carnarvon, when by the statutes of Wales 34 H. 8, and 35 H. 8, it was provided that all real and mixt actions shall be sued by writ, and all personal actions by plaint. And on error in B. R. the whole court held the action to be personal, and affirmed the judgment. And this is approved by the reporter, who argues that the annuity is a thing personal only, and no way touches the realty; and the books where it is held to be released by a release of actions real, as well as of actions personal, are according to him reconcilable by applying them to the case of a rent charge before election: for in such case a release of actions real will be a bar in annuity brought afterwards, and a release of actions personal a bar to a subsequent distress. On this whole matter, it is submitted to the judgment of the learned reader, that the position that the annuity is a thing personal merely, is confirmed rather than weakened, and that the cases afford no authority to Blackstone in saying that "a man may have a real estate in it."

In all other respects except that of descending to the heir, it bears none of the incidents and characteristics of real estate. Of this kind of inheritance, a husband is not entitled to be tenant by the curtesy, nor the wife to be endowed.¹ A grant of it to a corporation is not mortmain.² It cannot be conveyed by way of use, though hereditaments is a word used in the statute of uses, for want of the necessary seisin.³ It cannot be entailed within the statute *de donis*;⁴ and the reason is, according to lord Coke, that it concerneth no land, nor savour-eth of the realty. Though *tenements* be the only word used in the statute *de donis*, yet it includeth not only all corporate inheritances, but also all inheritances issuing out of any of those inheritances, or concerning or annexed to or exercisable within the same, though they lie not in tenure. If the grant be of an

¹ 1 Inst. 32, a.

² Ibid. 2, b.

³ Jones 137. Gilbert on Uses, 281. And see 2 Wilson 224.

⁴ 1 Inst. 20, a.

inheritance merely personal, or to be exercised about chattels, and is not issuing out of land nor concerning any land or some certain place, such inheritances cannot be entailed, because they savour nothing of the realty.¹ A grant of an annuity of inheritance to a man and the heirs of his body, creates a fee-simple conditional at common law, and after issue had the grantee may alien so as to bar the possibility of reverter.² It is not within the statute of frauds, so far as that affects real property. It will pass by a will not executed according to that statute, which however it is to be remarked, only employs the words "lands and tenements," though the clause immediately succeeding in regard to revocations, adds the word "hereditaments." This statute, though prepared with the utmost care and by men the most eminent in the profession, has its inaccuracies. "This annuity in fee," said lord Hardwicke in deciding the case of *Stafford v. Buckley*, "is a personal inheritance which the law suffers to descend to the heir, but has nothing to do with the realty, as appears from Co. Litt. 20, and so not within the statute of frauds, for lands and tenements only are within it. An advowson comes, indeed, under that description; for it may be held under *knight service*; and rents partake of the nature of land following that, and consequently are all within the statute; but nothing is within it, which is not a real right or interest, or partaking of the realty; as this annuity is not, though granted in fee." It cannot be barred as a rent may, by suffering a recovery.³ An assise does not lie for it.⁴ Nor does it escheat.⁵ Nor is it liable to the same kind of executions on judgments as real estates.⁶ Being a hereditament, however, descendible to the heir, it does not go to or form assets for the payment of debts in the hands of the executor;⁷ and it is forfeitable for treason under the English statutes,⁸ the words of 26 H. 8, c. 13, being, "shall lose and forfeit to the king's highness, his heirs

¹ 1 Inst. 20. ² *Stafford v. Buckley*, 2 Ves. Sen. 170. ³ Dr. & Stud. Drab. 1, c. 30.

⁴ 1 Roscoe on Real Actions, 68. ⁵ Ibid. 35. ⁶ 2 Woodeson 73. ⁷ Ibid.

⁸ *Nevil's case*, 7 Rep. 34, b.

and successors, all such lands, tenements, and hereditaments which any such offender shall have of any estate of inheritance in use, or possession by any right, title, or means."

The case, however, which seems entirely conclusive in relation to this matter, is *Aubin v. Daly*,¹ where, by letters patent, 24 Car. 2, the king granted to the use of A., his heirs and assigns forever, an annuity of £1000, to be paid out of his revenue of four and a half per cent. at Barbadoes and the Leeward Islands: * *held* that this annuity was personal property, and duly passed under a will attested by two witnesses, by a residuary clause bequeathing all the rest, residue, and remainder of a testatrix's personal estate, of what nature or kind soever to her executors. The counsel who argued against the executors, yielded the point that the will was sufficiently executed, and relied solely upon the ground, that owing to its inheritable character, it would not pass by the words of the residuary clause. He put the case of a will bequeathing all the testator's lands, tenements, and hereditaments to A. and all his personal estate to B., and argued that it seemed clear that A. would take such an annuity as this, and that the heir at law ought not to be disinherited without express words. Mr. justice Bayley is reported thereupon to have said, "that the argument would go to the length of saying that property of this description could only pass by a special devise." As the case was sent from chancery to the court of king's bench, no opinions are delivered, but a certificate was given in favour of the executors.

Assuming an annuity in fee to be personal estate, an interesting question may arise under some of our local statutes.

In New York, indeed, the authors of the revised code seemed to have had their attention turned to the very case of personal hereditaments, and cautiously to have excepted them from the general words of the statute.

¹ 4 Barn. & Ald. 59.

* The king cannot grant an annuity unless it be payable out of some part of his revenue; for he cannot charge his person.—1 *Salk.* 58.

After providing¹ that "the following property shall be deemed assets," to wit, (after a certain enumeration,) "goods, wares, &c., and every other species of personal property and effects not hereinafter excepted," it is expressly declared in sec. 8, that "the right of an heir to any property not enumerated in the preceding sixth section, which by the common law would descend to him, shall not be impaired by the general terms of that section."

In Pennsylvania, however, by the act of February 24, 1834,² entitled, "An act relating to executors and administrators," the executors are required to produce to the appraisers "the whole of the personal estate which may have come to their possession or knowledge;" and "all bonds, notes, and other evidences of debt, and all other claims and demands for money, or any other personal property owned or held by the decedent at the time of his decease, shall be returned in the inventory."

Taking the words of the legislature in their natural and legal import, and judging of their intention therefrom, it would not be difficult to arrive at the conclusion, that whatever in law is personal estate, was made assets in the hands of the executor, and that an annuity in fee, being settled to be such, would pass to them, and thus its descendible character being in effect done away, it would cease in the law of Pennsylvania to be a hereditament. It would thus be completely assimilated to all other kinds of personal property. A bond to pay a sum of money, or to do any other act, cannot by any words be made to descend to the heir; when paid it is converted into money and extinguished. It is familiar learning, that the same is true of all other chattels; which can only be limited over by way of executory devise, or through the medium of a trust. It is the perpetual character of an annuity, which is a continuing obligation as well on the grantor as on his heirs, so long as they have assets by descent, which admits of the creation

¹ Revised Code, part 2, c. 6, tit. 3, art. 1, s. 6.

² *Purd.* 436.

of a fee-simple in it; and of course of an estate for life with remainders over. The first taker would not at law, as in the case of an ordinary chattel, have the whole estate; nor even in the case of a grant to him and the heirs of his body; for upon his death without issue, the donor would be entitled as of his reverter.

This anomaly, it might well be argued, it was the intention of the legislature to abolish, and words they certainly have used strong enough to accomplish that object.

Yet the act in which the words in question are found, is one of the series reported by the revisers of the civil code, and adopted by the legislature in pursuance of their recommendation. In the construction of these acts, the supreme court of the state have evinced a strong disposition not to consider general words as effecting a change of the law, when such change does not appear to have been directly in view. Such a principle of construction, (though it is difficult to find a warrant for it in the books,) certainly guards against some of the evils of codification, and its operation in that respect may be beneficial. "We must remember," say the court in the *Commonwealth v. Rainey*,¹ "that these revised statutes which made extensive changes in the arrangement of the laws, necessarily left much to be adjusted by the courts; and we are consequently bound to preserve every provision which has not been expressly and necessarily repealed." In *Chambers v. Carson*,² it was decided, where the revised act had enacted, "that in every case in which a writ of *scire facias* may be issued, it shall be served and returned in the same manner as is therein provided in case of a summons in a personal action, and judgment for default of appearance may be taken at the same time and in the same manner as in case of a summons as aforesaid, unless it be otherwise specially provided," that the old practice of taking judgment for want of appearance upon two successive returns of *nihil*, was not affected by these broad words.

¹ 4 Watts & Serg. 187.

² 2 Whart. 372.

This principle applied to the act in question, may lead to the conclusion, that as neither the revisers nor the legislature had personal hereditaments in view, as they certainly had not, in the use of the general words *personal property*, they would continue to retain their descendible character.

On the other hand, it may be argued, that at common law, the annuity descended unincumbered by either curtesy or dower to the heir; that heir either one person, as the eldest son or brother; or one heir by a fiction, when it went to daughters or sisters as co-parceners. A careful examination of the books has not furnished any case of a partition of an annuity. Was it at common law a partible inheritance? and could the grantor have been subjected to more than one action? We must be guided by reason and analogy, and these do not seem to concur. No other mere personal duty is divisible. The obligor of a bond cannot be subjected to several actions by persons holding several and distinct interests in the money due. It would be highly unreasonable if it were not so. Yet immediate analogies seem to look the other way. A rent charge is entire and against common right; yet may it be divided between co-parceners, and by act in law, the tenant of the land is subject to several distresses.¹ Of a corody, certain partition may be made.² Corodies are a right of sustenance, or to receive certain allotments of victuals and provisions for one's maintenance. In lieu of which, (especially when due from ecclesiastical persons,) a pension or sum of money is sometimes substituted. And these may be reckoned another species of incorporeal hereditaments; though not chargeable on or issuing from any corporeal inheritance, but only charged on the person of the owner, in respect of such his inheritance.³ This analogy is complete; and resting upon its authority, we ought perhaps to conclude that an annuity at common law, was a partible inheritance. Looking, however, at the whole scope of the intestate acts in Pennsylvania,

¹ 1 Inst. 164. b.

² Ibid.

³ 2 Blackst. 40.

they seem to require a conversion into money, and a distribution among those entitled of the entire personal estate. The widow is decreed to have one-third of the real estate of the intestate for life, and one-third of the personal estate absolutely. This is the language of acts preceding those now in force, and has not been varied by the revisers, so that it is not subject to the question raised upon the proper principles to be applied to the construction of the revised code. Does the one-third of the annuity pass to the widow in fee-simple, and descend to her heirs? Yet the words of the act would not give a fee, had they been used in a grant between party and party. If the annuity be a hereditament, the word "heirs" seems as necessary to give a fee as in any thing else; and the word "absolutely" in itself means nothing but clear of limitation and qualification. How can the scope and intention of the act be preserved, without a conversion of the personal estate into money, and an actual distribution? All the provisions of the acts in regard to the partition of the estate of a decedent in the orphans' courts of the several counties, are confined in so many words to *real estates*.¹ Indeed, all the provisions of the various acts giving jurisdiction to the several courts, and regulating the proceedings in actions of partition at common law, speak only of *lands and tenements*, and cannot be strained to extend to any species of *personal estate*.² One or more of the acts indeed, use the word hereditaments; yet the provision in relation to the proceedings, and the general terms which the legislature itself uses, when it speaks of the courts "having jurisdiction in cases of partition of real estate," show that nothing but real hereditaments were in their contemplation.³ In Pennsylvania, we must conclude that an annuity in fee, if a hereditament, is not partible by compulsion of law, by any remedy now provided.

The further conclusion seems irresistible, that it is not a

¹ Act of 29 March, 1832, Purd. 834.

² Act of 11 April, 1799, Purd. 830.

³ Act of 7 April, 1807, Purd. 831. Act of 29 March, 1824, Purd. 833, &c.

hereditament at all—that it passes to executors—is assets in their hands for the payment of debts, must be sold and converted into money by the executors, and distributed among the next of kin according to the statutes.

It is not deemed necessary to go into an examination of the statutes of other states. Doubtless similar questions would be every where found to arise; and the same principles would be applicable to their determination.

Though annuities in fee may be rare in this country, annuities for life, or *pur autre vie*, must be of common occurrence. These too are personal estate within the decisions, and subject to its incidents and characteristics. Not to speak of annuities expressly, thus granted or devised, a rent charge will become an annuity, by failure of title of the grantor to the land upon which it is charged. A rent charge granted to a man and his heirs, is a rent in fee; yet as it requires the words, for himself and his heirs, on the part of the grantor to make an annuity in fee, the failure of the title to the land on which the rent is charged, converts such a rent in fee to an annuity for the life only of the grantor.¹ So if a rent charge be determined by act of God or the law.² But for a rent created upon a reservation, a writ of annuity does not lie.³

An annuity in fee considered in the right of personalty, presents another anomaly, that of the conversion at law of a thing from realty to personalty, by the act or election of the owner, without any change in the thing itself. Conversion is termed universally an equitable doctrine: resting on the principle that in equity, what ought to be done, is considered as actually done; but there is here presented the case of a legal conversion. If the grantee of a rent charge brought a writ of annuity, he thereby forever discharged the land; if he distrained, and upon that distress avowed in a court of record, he forever discharged the person.⁴ Until election by such act, it was rent and real estate, though both the person and land

¹ Comyn's Dig. tit. Annuity, a. 2.

² Ibid.

³ Ibid. a. 3.

⁴ Litt. sec. 219.

were chargeable; and after the title of dower or curtesy accrued, the heir could not oust such title by his election.¹

The subject thus presented to our readers may appear obsolete. We beg leave to enter our protest, against neglect or inattention to what may be termed obsolete branches of our jurisprudence. They are a part of its history, and necessary to be studied and understood, for the sake of the light they throw upon the system considered as a whole. Our modern libraries abound with elementary treatises valuable for reference, and some of which may be read in a course of study with advantage. By themselves, however, they make but superficial lawyers. It is in the constant study and familiarity with the older text books and reports, that the best foundation is laid for a solid superstructure of legal knowledge. It is in them that the mind is most usefully exercised, strengthened, and invigorated. What Locke has observed of the study of mathematics, may be applied with great truth to the prosecution of these inquiries: that though not a proposition in Euclid should be remembered, their principal advantage would remain in the force and acuteness they have imparted to the intellect. Mr. Preston strongly recommends the student to select some particular subject or head of the science: trace it up as you would a large river through its several tributary streams to their sources. The benefit of such an investigation, he thinks, extends much beyond the actual knowledge acquired, or the principles evolved, by the healthy tone which the exercise imparts to the mind, and by producing an aptness for other such investigations.

¹ 1 Inst. 144. b.

ART. IV.—LIMITATIONS OF ESTATES AFTER A
FAILURE OF ISSUE.

THERE is no question in the law more difficult than that which relates to the nature of the estate which is limited by devise, to take effect after the tenant of a precedent estate to whom a fee is given in terms shall die without issue.

The difficulty results from the impossibility of giving full effect to presumed intentions which are incompatible. It is supposed to be the obvious intention in all cases, that the limitations shall have effect, whenever the first taker shall die without issue living at the time of his death. On this construction the estate would be a fee subject to an executory devise. But the intention also is, that if the devisee shall have issue, he shall take an estate descendible only to such issue. This is an estate tail.

When an estate is devised to one and to his heirs, and if he shall die without issue, then over, the general intent is, to create an estate tail. The particular intent is to create a fee determinable upon a contingency.

In every one of the cases which have arisen on this subject, the question has been, which intention should be carried into effect, and which should be sacrificed?

Mr. chancellor Kent¹ expresses the opinion, however, that the words dying without issue in a devise, are understood by testators to mean an indefinite failure of issue. He says:

“It has been repeated in the books from case to case, that testators generally mean by the words *dying without issue*, or *departing this life without lawful issue*, or other words of similar import, a failure of issue at the time of the death of the devisee, and that they do not mean a general or indefinite failure of issue. This is said to be the meaning of the words in common parlance or usage. I am rather inclined to think

¹ 16 John. R. 401.

however, that this notion of what the testator intended, has been borrowed by one judge from another, without much reflection or examination as to its truth. I doubt the truth of the fact. I believe that when the courts gave to those words the construction of an indefinite failure of issue, they did not depart from the sense of the will. It may be that in many cases the construction was not what the testator meant, but it may equally be, that in many other cases the courts would have counteracted his intention, if they had adopted any other construction. The intention generally, is to give the property over to third persons only in the event of the son not leaving any family who may want to enjoy it. The testator can have no motive to fix the precise period of his son's *death*, as the era at which the limitation is to be determined. He can have no pressing inducement to fix any definite period. He means to give the property to his son, and to his posterity, if he has any; but if he has none, or if his posterity becomes extinct, he means then that the property shall go over to the next devisee, who is not so close to him as the son and his posterity, but who, however, stands next in his affections. This is the popular and the rational meaning, for it is founded on the dictates of the heart. I incline to think that in nineteen cases out of twenty, the testator really means a general or indefinite failure of issue."

On the other hand, the revisers of the New York statutes are of opinion, that the words are always understood in their common and popular sense. In their notes to the revised statutes they say:

"In most cases, it is expressed, that the limitation over shall take effect in the event of the first taker's 'dying without issue or without leaving issue;' and in these cases, it is believed that the meaning which the law affixes to the terms, viz. a failure of issue at any period however remote, soon after the death of the first taker, is very opposite to that of the party by whom they are employed.

"It has often been remarked by judges in England and in

this country, that it is not probable that testators are aware of the technical construction given by the courts to the words 'dying without issue,' and that they undoubtedly intend by them, a dying without issue *living at the death* of the person named, which is supposed to be the obvious and natural meaning of the expressions.

"It is true that chancellor Kent in *Anderson v. Jackson*,¹ suggests that 'this notion has been borrowed by one judge from another, without much reflection or examination as to its truth;' and he gives it as his opinion that the legal interpretation of the phrase accords with the popular understanding of its signification. The revisers however are strongly inclined to the general opinion above stated.

"To them it seems hardly credible that a person not conversant with the technical rules of law, would ever dream of the construction which these rules have affixed to the phrase. If this is so, then it follows that the law of this state, as it now stands, gives to the first devisee in cases of this sort, an absolute estate, contrary to the intention of the grantor or testator."

But the truth is, a testator has ordinarily both intents. His design is to confine the descent to a certain line of heirs, and to make that estate determinable on a contingency, at the death of the first taker; and he is not aware that his whole intention is neither compatible with an estate in fee, nor an estate tail.

The courts have therefore been constrained to determine, where the objects of the testator were thus inconsistent, what was his prevailing intention, and the particular intent has been rejected for the sake of carrying out the general purpose. The particular intent has prevailed only in those cases where words of limitation were used, which showed that the estate of the first taker was made determinable on a special contingency. The case of *Pells v. Brown*,² has been called the magna charta of this branch of the law. In that case William Brown devised lands to Thomas Brown his second son, and

¹ 16 John. 400.

² Cro. Jac. 590.

his heirs forever; and if Thomas died without issue, living William his brother, that then William his brother should have those lands, to him and his heirs and assigns forever. The court decided that this was a good limitation of the fee to William upon the contingency. It was undoubtedly the intention of the testator in this case, to give an estate to Thomas Brown which should be restricted to the issue of his body, and this intention was disregarded when the estate was construed a determinable fee.

The circumstance that the limitation over was to take effect on an event which was independent of the regular determination of the precedent estate, seemed to the court a sufficient reason for construing that estate as determinable on a contingency, and for disregarding the general intent, which was to make the estate inheritable in a certain line.

It is observable, that the construction which prevailed in the case of *Pells v. Brown*, changed the quantity of interest in the devisee, that effect might be given to a subsequent limitation, and trenched upon an interest reserved by the testator for the sake of supporting the particular intent.

This case has often been questioned, but the rule which it recognised has been sustained; and whenever an estate is by devise limited to a man and to his heirs, and if he shall die without issue *living at the time of his death*, the inheritance is not restricted to heirs of the body, according to the will of the testator, but the estate of the devisee is construed to be a fee-simple conditional, subject to an executory devise.

Originally the effect of this construction must have been to defeat the principal intent of devisors in innumerable cases; but the words which influenced the decision in the case of *Pells v. Brown*, have acquired a technical efficacy, and whilst in this class of cases the words *dying without issue*, always at common law create an estate tail, the words *dying without issue living at the time of the death* of the first taker, now invariably create a fee-simple determinable.

The cases in England, in an unbroken series until the time

of lord Kenyon, show in the words of lord chief justice Willes, in *Brece v. Smith*,¹ "that if a man devise an estate to A. and his heirs, and afterwards in his will gives his estate to another in case A. dies without issue, those subsequent words reduce A.'s estate to an estate tail." In the case of *Doe v. Fonnerau*,² lord Mansfield said, no case was to be found in a will of real property in which the court on the words *in default of such issue*, had restricted the words to issue *living at the death of the first taker*.

But in the case of *Porter v. Bradley*,³ lord Kenyon introduced a new rule. In that case the devise was to one, his heirs and assigns forever, and if he die *leaving no issue behind him*, then over, and it was decided that the limitation over was good by way of executory devise. Lord Kenyon admitted that "a long string of cases might be cited, in order to show that where an estate is limited to a man and his heirs forever, and if he die without leaving heirs, then to his brother, or to any person who may be his heir, those words shall not have their full legal operation, but shall be restrained to heirs of a particular kind, namely, heirs of the body." He was of opinion that the words applied to the first taker, *if he shall die leaving no issue behind him*, were equivalent to dying without issue living at the time of the death of the ancestor. Lord Kenyon also expressed the opinion that if the words *leaving no issue* had been used, they must be restrained to leaving issue at the time of his death.

His lordship cited the opinion of lord Macclesfield in *Forth v. Chapman*,⁴ in support of these views, and that these words could not have a different meaning, when applied to real and personal property.

The neglect to make the distinction, may be regarded as the cause of his error in this case. There is such a distinction, and it is important to be noted.

It is to be observed that the question is one of intent, and

¹ Willes R. 1.

² Doug. 504.

³ 3 Term Rep. 143.

⁴ 1 P. Wms. 663.

relates to the nature of the estate which in such cases is created by implication. In limitations of real property, when an estate is devised to one and his heirs, and if he shall die without issue, then over, the question is not whether it was the intention of the testator that the limitation over should have effect on the death of the first taker; such is always the intention: but the inquiry is, what estate is intended to be given—a fee-simple conditional or a fee tail? No such question can exist in regard to personal property. There can be no estate tail of personalty; no intent to create an estate tail in personal property can be implied. The only intention of a testator who bequeaths his personal estate after a dying without issue, is that the limitation shall take effect when the interest of the first taker determines, and that cannot be continued beyond his own life.

In the case of *Forth v. Chapman*, one possessed of a freehold and leasehold estate devised it to A. and B., and if either of them died and left no issue of their respective bodies, then to C., and this was held a good limitation to C. if A. or B. left no issue at their death.

Lord Macclesfield said that there was the plainest distinction between a devise of a freehold, and a devise of a term for years; for in the devise of the latter to one and if he died without issue, then to another, the words if he die without issue, cannot be supposed to have been inserted in favour of such issue, since they cannot by any construction have it. He was therefore of opinion that as to the freehold, the construction of the words should be, a dying without issue generally, by which there might be at any time an indefinite failure of issue; and that with respect to the leasehold, the same words should be intended to mean dying without leaving issue at their death.

There is no inconsistency in this construction. The testator's meaning is, that the limitation over shall have effect when the precedent estate shall fail. The estate in the freehold property might have indefinite continuance. The leasehold estate could not endure beyond the life of the first taker.

The words have not a different meaning when applied to real and personal property, but they are applied to estates having a different extent. Whenever there is a default or failure of issue inheritable, or which by the devise was capable of taking, the first taker dies without issue, and on the limitation of personal property there is such a default at the time of his death. There is *then* a failure of issue capable of taking, in the same manner as when a restricted line of inheritance fails.

The distinction taken in *Forth v. Chapman*, was never questioned before the case of *Porter v. Bradley*. In that case lord Kenyon, when he denied the soundness of the distinction, seemed to suppose that if limitations of real and personal property were on the same footing, all the cases of wills of personal property, in which it had been decided that the words *dying without leaving issue* or *without leaving issue behind*, were equally applicable to real property, although the cases before his time, in which such words had been construed to relate to an indefinite failure of issue, had been uniform.

Lord Kenyon relied much upon the words *leave no issue behind him*, as necessarily importing that the testator meant at the time of his son's death; but the general intention was equally clear that a restricted estate of inheritance should be created; and this had never been made to yield to the particular intent, except in cases where the words used expressly provided for a failure of issue living at the time of the death of the ancestor.

In the case of *Roe v. Jeffery*,¹ lord Kenyon again applied the rule adopted in wills of personal property, to limitations of real estate. The devise was to J. F. and his heirs forever, and in case he should depart this life and *leave no issue*, then over. The case was considered perfectly analogous to *Pells v. Brown*; and the only question was stated to be, whether

¹ 7 J. R. 589.

from the whole context of the will, it might be collected, that when an estate is given to A. and his heirs forever, but if he die without issue, then over, the testator meant dying without issue living at the death of the first taker.

If the words, *leaving no issue*, were relied upon as showing an intention to create a fee-simple determinable, that construction was supported by no case except that of *Porter v. Bradley*. There were circumstances, however, in the case which justified the construction which prevailed, and lord Kenyon himself seemed disposed to recede from the ground he had taken against the construction in *North v. Chapman*.

The views of lord Kenyon have never been sustained by the courts in England; but the rule as previously understood has been constantly maintained. In *Crooke v. De Vander*,¹ lord Eldon said, that "the case of *Porter v. Bradley* appeared to him to shake settled rules to their very foundations, and that he would not add to the doubt that dictum had thrown upon one of the most established points of conveyancing," by acknowledging its authority. In *Jenny v. Agar*,² a devise was to a son in fee, on condition that the devisee paid a legacy to a daughter, and on failure of payment then to her in fee; and in case the son and daughter both died without leaving any child or issue, then the estate was devised over. The court sustained the general intent, which was that the devise over should not take effect until all the issue of both the son and the daughter were extinct. Le Blanc j. said, there was no case where the words, *dying without leaving issue*, had been adjudged to mean *leaving issue at the time of his death*.

In *Romelly v. James*,³ the limitation over was to take effect if the first taker should die leaving no issue of his body, and it was held by the court that the devisee took an estate tail, and not a defeasible fee-simple. Thus in England, with the single exception of the case of *Porter v. Bradley*, has a limitation after a dying without issue, been steadily held to refer

¹ 9 Vca. 202.² 12 East 253.³ 6 Taunt. R. 263.

to an indefinite failure of issue, unless the words were *dying without issue living at the time of the death*, as in *Pells v. Brown*. The unfortunate error of lord Kenyon had no bad consequences in that country, and the true doctrine was soon re-established; but the doctrine of *Porter v. Bradley* was early adopted in the state of New York, and the result has been a very serious innovation in the law of real property.

In the case of *Fosdeck v. Cornell*,¹ a testator devised his real estate to his four sons and a daughter, and added that if any of his said sons William, Jacob, Thomas, and John, or his daughter Mary, shall happen to die without heirs male of their own bodies, that then the land shall return to the survivors to be equally divided between them: and the court held that these words did not create an estate tail, but a fee-simple defeasible, and that the limitations to the survivors took effect by way of executory devise. The court relied upon the doctrine in *Porter v. Bradley* and *Roe v. Jeffery*, and seemed to think the only question to be, whether the testator intended that the limitation over, should take effect on survivorship, without regarding the manifest general intent that the issue of the devisees should take a restricted inheritance, and that the limitation over should only have effect when the line of inheritance failed. In inquiring after this intention to give the estate to the survivors, the distinction between cases of real and personal property was disregarded, and the case of *Hughes v. Sayer*² was cited as directly in point. In that case, the testator had devised his personal estate to A. and B., and upon either of them dying without children, then to the survivor. The master of the rolls said, that if the word children was understood to be the same with issue, in that case, then the devise over of the personal estate upon a death without issue, would be void; but that here the words, dying without children, must be taken to be children living at the death of the party.

¹ 1 John. R. 440.

² 1 P. Wms. 534.

If in the case of *Fosdeck v. Cornell*, the word children instead of heirs, had been used, the two cases would not have been dissimilar, if they had both related to real property; but the court in *Hughes v. Sayer*, were clearly of opinion, that if the limitation had been after a dying without issue or without heirs, an estate tail would have been created, and the limitation would have been too remote.

But though the case of *Hughes v. Sayer* was inapplicable, there are a great number of cases which would have justified the decision, if the distinction between cases of real and personal property was abolished.

In *Moffat v. Strong*,¹ the question arose on a limitation of personal estate. A testator gave a certain interest in his real estate and also in his personal property, to his four sons, and provided that if they should die without lawful issue, their respective parts should be divided equally among the survivors. It was decided that it was the intent of the testator to provide for the surviving sons on the contingency of either of the sons dying and leaving no issue at his death. The opinion of the court was delivered by Kent c. j., and notwithstanding the recent decision in *Fosdeck v. Cornell*, it is quite remarkable that he declined to sustain the dictum of lord Kenyon in *Porter v. Bradley*, deeming it "hazardous" after the opinion of lord Eldon in *Crooke v. De Vander*.

In the case of *Anderson v. Jackson*,² the subject was again presented and received a final determination in the court of errors. In this case, the testator Medcef Eden devised certain lands to his son Joseph Eden and his heirs forever, and certain other lands to his son Medcef Eden and his heirs, and provided "that if either of his said sons should depart this life without lawful issue, his share or part shall go to the survivor; and in case of both their deaths without lawful issue, then I give all the property aforesaid to my brother John Eden and my sister Hannah Johnson, and their heirs." The

¹ 10 John. R. 12.

² 16 John. R. 382.

case came before the court on a writ of error from the supreme court, which had decided that the estate of Joseph Eden was a fee-simple conditional, on the authority of *Fosdeck v. Cornell*.

Mr. chancellor Kent had now become thoroughly convinced of the error of lord Kenyon, and of the fallacy of his dictum in *Porter v. Bradley*, and he made a powerful effort to regain the ground which had been lost. He said: "I discovered years ago that the case of *Fosdeck v. Cornell* was decided upon mistaken grounds. The court, however, have this apology for themselves, that without much examination, and without looking as they ought to have done, deeply into the subject, they were lead astray out of the beaten track, by such a distinguished leader as lord Kenyon. The cases of *Porter v. Bradley* and of *Roe v. Jeffery*, were the blind guide that misled them."

The court of errors, however, refused to restore the old rule, and affirmed the judgment of the supreme court; so that the doctrine was established, that when real property is devised to a man and his heirs, and other land to another and his heirs, with a provision that if either died without issue, the whole should remain to the survivor, a fee-simple conditional is created. Thus an innovation was made upon the common law as important as was that introduced by *Pells v. Brown*. The substance of the decision in the latter case was that when the words used were, dying without issue living at the time of the death, notwithstanding the general intent to create an estate tail was strong and apparent, it should yield to the particular intent, to effectuate which it was necessary to construe the limitation as creating a fee-simple determinable. The cases of *Fosdeck v. Cornell* and *Anderson v. Jackson*, gave the same effect to the word survivor; and the only result of the new doctrine has been, that the range of cases is extended in which the principal intent of the testator is defeated. The courts have declined to extend the doctrine of these cases to a general dying without issue, or to abolish the

distinction between limitations of real and personal property; and the general rule respecting limitations after an indefinite failure of issue, remained in full force until the change made by the revised statutes in 1830.

In the case of *Leon v. Burtis*,¹ the construction of the will of Medcef Eden was again under consideration upon the question what estate Medcef Eden Jr. took by the devise, it having been decided in *Anderson v. Jackson*, that Joseph Eden took a fee-simple devisable, which vested in Medcef Eden on the death of Joseph Eden without issue living at the time of his death. Whatever estate was given to Joseph, was also devised to Medcef. He also took an estate in fee, upon which an executory devise to Joseph was limited. The court however decided that on the death of Joseph, the nature of the estate underwent a change; first, that it became an estate tail, and that then by the operation of the statute abolishing estates tail, it was again converted into an absolute fee, but that in the progress of its transformation, it was divested of the limitations made by the will.

The court were of opinion that when the executory devise to Medcef Eden vested in possession, the subsequent estate of the brother and sister was turned into a remainder, and that Medcef became seised in fee tail by necessary implication, with the remainder expectant. In support of this view of the case, the court say:

"In 2 Saund. 388, h., Sergeant Williams, in a note, says: 'With regard to executory devises, it is a rule, that wherever one limitation of a devise is taken to be executory, all subsequent limitations must likewise be so taken;' but he adds: 'However, it seems to be established, that wherever the first limitation vests in *possession*, those that follow vest in interest at the same time, and cease to be executory, and become mere vested remainders, subject to all the incidents of remainders.'"

¹ 20 John. R. 483.

But the doctrine of Sergeant Williams was wholly inapplicable to the case. The executory devise to which he alluded were in their nature capable of vesting, when the estate upon which they were limited vested, and were only executory because that estate was not vested; but the devise in this case was still in its nature executory after the precedent estate was vested. At the time of the devise, the limitation to the brother and the sister of the testator was an executory devise, limited to take effect within the time allowed by law. The events on which it was to take effect, were the deaths of Joseph and Medcef Eden without issue. When Joseph died, it did not cease to be executory, because it was not to vest until the death of both; and when it did vest by the happening of the events provided for, it must necessarily have vested in possession, as an absolute estate.

If the limitation to the brother and sister of the testator, had been a remainder, the precedent estate must have been an estate tail; but that estate was decided to be an estate in fee-simple determinable; the limitation over was consequently an executory devise;—but this executory interest is changed into a remainder on the principle supposed to have been stated by Sergeant Williams, and then the precedent estate becomes an estate tail.

The substance of the decision, however the result is attained, is that an estate was devised by the testator, which was a fee-simple until the next limitation over vested, and that when this estate was vested, it became an estate tail, because the ultimate limitation was to take effect as a remainder, which by a necessary implication changed the precedent estate into an estate tail.

Whatever was the character of the estate devised to the two sons was derived from the will itself, and was independent of any subsequent event. If the ultimate limitation was inconsistent with the exercise of the powers belonging to the tenant of a fee-simple estate, it was equally so before as after the executory devise to Medcef Eden took effect. If the im-

plication which resulted from a devise over after a failure of issue of the sons, was that the testator contemplated a descent in a restricted line of inheritances, that implication related not to the vesting of a precedent executory devise, but to the making of the will.

To sustain the ultimate limitation, it was necessary that the powers of the first devisee should be restricted; that he should have an estate descendible, not to his general heirs, but according to the declared or implied intention; and that all these qualities should exist from the time the devise took effect.

On the other hand, if the qualities, powers, and incidents of an estate, which was incompatible with subsequent limitations, existed at any time, they were impressed upon the estate, and determined its character.

When the nature of the investiture of a fee is considered, it is apparent, that the estate devised or granted, must take its peculiar characteristics at the moment the estate is created. On a devise, the fee is not permitted to be in abeyance. Whatever interest does not vest in the devisee, descends to the heir at law.

When the first limitation passes less than an absolute fee, all subsequent limitations in the devise take effect out of the reversionary interest. If at the time of the devise, the intent is manifest to create an estate of inheritance on the determination of the precedent estate, and on the failure of issue inheritable to that estate, that ultimate limitation must of necessity control all preceding interests. The whole will is then governed by the last limitation, as lord Eldon in *Barnfield v. Welton*,¹ supposed the limitation in *Clache's*² case to have been. In the latter case, "one devised a messuage to Alice his daughter and her heirs, and another messuage to Thomasin his daughter, then eight years old, and her heirs; and if she died before she attained the age of sixteen years,

¹ 2 B. & P. 328.

² Dyer 330, b. 1 Roll. Abv. 839, pl. 3, S. C.

living Alice, then he willed that Alice should have Thomasin's share to her and heirs; and if Alice died having no issue, living Thomasin, that Thomasin should have and enjoy Alice's share to her and her heirs, and if both daughters should die having no issue, devise over to J. S. and his heirs: and it was held that the daughter took an estate tail, and not a fee on a contingent subsequent."

The case cited by lord Eldon has been very much doubted, and the limitations to the daughters, if taken independently, might have been construed to create a fee; but the limitation to J. S. by a necessary implication, reduced the estate of the daughters to an estate tail. If it was the intention of the testator to limit an estate to take effect only when the lines of inheritance designated by the precedent limitations were exhausted, estates less than a fee were created by such limitations. If in the case cited, the particular intent of the testator had prevailed, and the limitations to the daughters had been construed to create a fee determinable on the contingency, the character of the subsequent estate of inheritance would have been decided by those limitations. The ultimate estate would not take effect as a remainder, and only on the happening of the event which should determine the precedent estates.

By the limitations of a devise, or by operation of law, the whole estate passes by actual investiture, either according to the limitations, or to the heir at law. When the construction is settled, and the intent is shown, the various limitations which may have been carried out of the fee, are vested, taking effect from the death of the testator, and are incapable of change.

If the will is capable of two constructions which are incompatible, that construction which is adopted must be sustained. Under the will of Medcef Eden, if by the frame of the limitations, an executory devise was made to the brother and sister of the testator, that could not be changed into a remainder, without subverting the intent and all the precedent estates.

In construing wills, the great object of courts is, to discover

the intention of the testator. If that can be ascertained, and is consistent with the rules of law, it will be carried into effect. In the case in question, according to the construction which had been adopted, the intention of the testator was to limit a fee on the death of his two sons without issue living at the time of their death. This was an executory devise. By changing the interest into a remainder, it was made to take effect on a different event not within the intention. It had been decided that the testator intended to create a fee determinable on a contingent event; but the court say, As they had changed the executory devise into a remainder, that implied a particular estate, and therefore it was necessary to change the defeasible fee into an estate tail: thus the very construction was adopted which the court had itself repudiated, and the intention of the testator prevented from having effect.

Even if there is such a union of estates as would in conveyancing at common law, operate by way of merger or extinguishment of a future interest, that result is not permitted to take place, when by such a merger the ultimate limitations by devise would be prevented from taking effect.

In the case of *Goodtitle v. White*,¹ an estate was devised to the daughter of the testator, which was an executory devise with a subsequent contingent limitation to the wife of the testator, and it was contended that on the death of the mother her contingent or executory interest descended to her daughter; and so the two several estates created by the will of the testator vesting in one person, the contingent or executory estate from that moment ceased to exist. The court decided, that the estates were not united in such a manner, as to prevent the subsequent limitation from having effect, and that there could be no change of estate in a party claiming under the will which could disappoint the intention of the testator. The same doctrine prevailed in *Goodright v. Searle*.²

¹ 5 B. & P. 393.

² 2 Will. R. 29.

Although it is incident to limitations after an estate tail, to be barred by a common recovery, it is indeed a novel rule of construction by which an executory devise is changed into a remainder, that by a necessary implication a preceding estate may be changed to an estate tail, when the consequence of such change is entirely to defeat the intentions of the testator.

But however remarkable this rule of construction may be considered, it was adopted by the supreme court and affirmed by the court of errors, in relation to that part of the estate which was devised to Joseph Eden, and which on the happening of the contingency provided for, vested in Medcef Eden; but the effect of the limitation to John Eden and Hannah Johnson, the brother and sister of the testator, of the estate devised to Medcef Eden after a general failure of issue, whether it constituted an estate tail in Medcef, or an estate in fee-simple defeasible, or whether the limitation over was void as being too remote, has never yet received a judicial construction.

In *Leon v. Burtis*,¹ Spencer j. says: "The estate of John Eden and Hannah Johnson was turned into a remainder when the executory devise took effect in favour of Medcef Eden." But this *change*, which wrought such a general transformation of estate, only took effect in that part of the land which was devised to Joseph Eden, and in which Medcef Eden had an executory interest. This executory interest was capable of transmutation to a vested estate. The estate which was devised to Medcef Eden by the will, and which vested at the death of the testator, was decided to be an estate in fee, and no change could be produced in that estate by the death of the party to whom it was limited over on a contingent event. That event could have no effect on the estate of Medcef Eden, and would only make way for subsequent limitations. At the time of the death of the testator, an estate vested in Medcef Eden, which would lose none of its cha-

¹ Page 489.

racteristics until its regular determination or the substitution of a new estate. No implication would arise from the ultimate devises ceasing to be executory, for on the construction adopted by the court, those devises became remainders, not upon all the precedent estates, but only on the executory devise which devolved on Medcef when Joseph Eden died without issue. On the vesting of the executory devise, it was construed an estate tail. It received this character when it took effect by substitution. No such absurdity was even imagined as the change of an estate, during its continuance, from a fee to a restricted and partial interest.

It is true that Spencer c. j. seems to speak of the whole estate as having undergone a transformation to an estate tail; but the reasons which he assigns for that construction, are certainly inapplicable to any other interest than the executory devise, and that only was under consideration.

The estate of Medcef Eden then at the time of his death in the lands which were originally devised to him, was a fee, and the question arises, what was the meaning of the words dying without issue, on which the limitation over was to take effect?

In general, when it has been necessary to determine the construction of these words in a devise, the question has been whether the estate determinable on a failure of issue, was an estate in fee or in tail; but that question cannot arise in this case, because on the previous limitation it was decided that the estate was a fee. The words should be taken in their natural and obvious sense, unless by a settled rule they are to receive a different construction; and it is believed that on limitations of real estate, whenever an estate in fee has been made determinable on a dying without issue, those words have been construed to mean a dying without issue living at the time of the death. The intent to make the estate defeasible at the death is apparent, and that is not countervailed by a general intent implied from the words to continue the estate until the failure of a certain line of inheritance.

In limitations of personal property, the words in question have received the same construction as in devises of real estate, although an estate tail could not be created in personal property; but in such cases the intention has existed, to limit personal property in tail. The courts have carried that intention into effect, but have given the first taker an absolute interest. In such cases there is no question in regard to an estate created by implication, and the inquiry relates only to the meaning of the words.

It has been supposed that the rule laid down by lord Macclesfield in *Forth v. Chapman*, was absurd in itself, and that it had been repudiated in subsequent cases; but we conceive that this idea has proceeded in some measure from a misapprehension of that case. In all devises by which land and personal property is given, and limited over after a failure of issue, there are two questions to be considered, in regard to the limitation of the personal property: 1st, Whether an estate tail is devised, which in personalty always becomes an absolute estate by operation of law; 2d, Whether the testator has made use of such terms ~~of~~ devise as will carry that estate over. If the testator has employed terms which indicate a *legal intent*, to devise the personal estate over on the failure of issue living at the time of the death, the interest of the first taker is not to be construed as absolute. It is in effect an estate for life.

In regard to real estate, there is but a single question, viz. whether an estate tail is devised. If an estate tail is created, the limitation over is a remainder: but the limitation after a devise of personal estate is an executory devise. Lord Macclesfield was of opinion that the devise in *Forth v. Chapman*, implied an estate tail in the first taker, both of the real and personal estate. An estate tail in personalty would be an absolute estate, and a limitation over after a *dying without issue*, would be too remote. But the words, *dying without "leaving issue,"* in that case were construed as a leaving issue at the time of the death.

It is strange that in limitations of personal estate, the words *dying without issue* should ever have been construed in any other than their natural sense, because in regard to such limitations, there is not as in cases of real estate, any general intent which is to be sustained in opposition to the particular intent, by referring these words to a general failure of issue. In relation to this construction of devises of personal estate, chief justice Wilmot says: "I cannot help shedding a tear upon the introduction of such a solecism into the land. But I will relate how it happened: it was owing to a fundamental mistake originally, in transferring a construction which had been put upon these words when applied to estates of inheritance, which might be entailed, to leasehold, and personal estates which could not be entailed."¹

But various words and expressions have taken the case out of the rule which would not be permitted to have that effect in limitations of estates of inheritance.

The doctrine in *Forth v. Chapman* was recognised in *Sheffield v. Orvery*.² In that case the devise was of a certain interest in freehold and leasehold estates, with a limitation over if the first taker died without leaving issue. Lord Hardwicke was of opinion, that a "strict settlement" was intended; and although an estate tail could not be created in leasehold, by words which would have that effect in a limitation of freehold, an estate was given on which the testator manifested an intention to limit an executory devise, by the words *leaving no issue*.

It has been supposed that in *Beauclerk v. Dormer*,³ lord Hardwicke denied the propriety of the distinction in *Forth v. Chapman*; but this was not his meaning. In that case the testator devised as follows: "I make D. my sole heir and executrix, and if she die without issue, then to go to lord George Beauclerk." The devise was of real and personal estate. It was not denied that it was the intention of the tes-

¹ Opinion 314, *Keeley v. Fowler*.² 3 Atk. R. 282.³ 2 Atk. 308.

tator to create by implication an estate tail, both in his real and personal property, and that on the distinction in *Forth v. Chapman* an estate tail was created in the one, and an absolute estate in the other; but it was decided that the limitation after the devise of the personal estate, was not made by such words as would reduce what would otherwise be an absolute estate in the personalty, to an estate for life, and that therefore it could not have effect. Lord Hardwicke said, that in *Forth v. Chapman* "he was counsel himself, and that by the note he took upon the back of his brief, it appeared that lord Macclesfield laid a good deal of weight upon the particular penning of the will, if either of the nephews depart this life, and leave no issue of their respective bodies; these words he said, must relate to the time of their deaths, and it would be a forced construction to have extended it to a dying without issue generally." Lord Hardwicke held the limitation over too remote, because it was after a dying without issue generally, and there were no circumstances which confined it to the time of the death. In *Crooke v. De Vander*,¹ the devise and bequest was of real and personal estate to A. and the heirs of his body, with a limitation over if he has no such heirs. Lord Eldon adopted the distinction in *Forth v. Chapman* expressly. He decided that the effect of the limitation was to create an estate tail in the real estate, and an absolute interest in the personal: but was of opinion, that if the words had been *if he leaves no such heirs*, the limitation over would have been good as confined to the time of the death.

In *Chandless v. Price*,² the devise was of real and personal property, by words that would give an estate tail in the real estate; and lord Loughborough was of opinion, that a *quasi* estate tail in the personal property was intended to be given, which was an absolute property, as there were no words to cut down that absolute interest to a mere tenancy for life. In this case, the distinction in *Forth v. Chapman* was fully

¹ 9 Ves. R. 197.

² 3 Ves. R. 101.

recognised, and the limitation over was considered void, only because the words to control the preceding limitation were not the same as in that case.

In *Daintry v. Daintry*,¹ the testator devised real and personal estate with a limitation over, and the court in this case adopted the distinction in *Forth v. Chapman* as sound, and in the certificate which they sent to the master of the rolls, expressed the opinion, that an estate tail was devised in the real estates of inheritance, and as to the leasehold interest, that an absolute estate vested in the first taker.

But it has been supposed that in the case of *Porter v. Bradley*,² lord Kenyon intended to express the opinion, that when real and personal estate was devised with a limitation over, as in *Forth v. Chapman*, by whatever words the limitation was made in the same will, an absolute estate might not be created in the personalty, and an estate tail in the realty; this however, was not his meaning, as is apparent from the certificate in the case of *Daintry v. Daintry*. His lordship supposed no such distinction could be founded upon the word "leaving," and he seemed to suppose that word ought to have the same efficiency in limitations of real as of personal property. There is no doubt that if in *Porter v. Bradley* the limitation over had been after a dying without issue, the court would have certified, that an estate tail was created; and if there had been a bequest of personalty in the same will, that there was a good executory devise after an estate for life in the personalty.

In *Roe v. Jeffery*, lord Kenyon said, "that the distinction taken in *Forth v. Chapman*, that the very same words in the same clause in a will, should receive one construction as applied to one species of property, and another construction as applied to another, was not reconcilable with reason:" but lord Kenyon could never have doubted that if the words in the same clause, had received the same construction as

¹ 6 J. R. 307.

² 3 J. R. 143.

applied to each species of property, different estates must have been created in real estate and personalty.

When it is considered that in strict limitations of realty, there is a general intent and a particular intent, which can never be the case in regard to the personal estate, there is no absurdity in construing words of limitation to mean an indefinite failure of issue in the one case, for the sake of supporting what was on the whole the intention, whilst the common sense rule is adopted in the other case, for the sake also of supporting the actual intention. The only absurdity was that spoken of by chief justice Wilmut, of construing words of limitation in bequests of personal property, as ever meaning an indefinite failure of issue. The strictness of this construction had been greatly relaxed in regard to personal property, and lord Kenyon manifested a desire to put both kinds of estate on the same footing. His lordship was very far from denying that a limitation in a will of real and personal estate after a dying without *leaving* issue, was effectual to create a good executory devise of the personal property. On the contrary, he so claimed, and that the limitation of the real estate was also good as an executory devise.

The construction adopted in *Forth v. Chapman* in regard to personalty, was always recognised by lord Kenyon. In *Goodtitle v. Pegden*,¹ leasehold premises were bequeathed to A. and his lawful heirs, and if he die and leave no lawful heirs, then to B., and lord Kenyon c. j. said, on conference with the rest of the court, they were clearly of opinion on the authority of *Forth v. Chapman*, which had been uniformly followed by a series of cases down to the present time, that the limitation over is good. There are many cases, in which bequests of personal property, with a limitation over, if the first taker shall die without leaving issue, have been construed to create a good executory devise. In the case of *Patterson v. Ellis*,² a different doctrine, however, prevailed. In that

¹ 2 J. R. 720.

² 11 Wendell R. 261.

case the testator gave by his will a sum of money to his daughter provided she should attain the age of twenty-one years, but that in case his said daughter should die before she arrived at the age of twenty-one years, and without leaving lawful issue, that it should be disposed of with the residue of his estate. The testator also provided that if his daughter attained the age of twenty-one years, the property should be at her free and absolute disposal. The question was whether the limitation after the interest bequeathed to the daughter, was valid as an executory devise.

Mr. chancellor Walworth decided that the words *without leaving lawful issue*, meant without lawful issue at the death of the legatee, and that the limitation over was valid. The learned chancellor said that this construction was the natural sense of the words, and the sense in which the testator intended to use them, and he expressed the opinion that the law had been settled in conformity with the construction adopted for more than a century. The case was brought before the court of errors on an appeal from the decree of the chancellor, by which court that decree was reversed on the ground that the limitation after the interest devised to the daughter, was too remote.

It is remarkable that Savage c. j., who delivered the opinion of the majority of the court, discusses the question precisely as if the property was real estate, cites the statutes of Westminster 2d, *de donis*, and the leading cases on limitations of real estate; and from these cases, attempts to draw an argument to limitations of personal property, which have so long rested on the peculiar and anomalous grounds so forcibly explained by lord chief justice Wilmot. He then proceeds to examine the solidity of the distinction in *Forth v. Chapman*; though in the case under consideration there was no question respecting a devise of real estate.

He denies the justice of the distinction in that case; but the conclusion at which he ultimately arrives is quite the converse of that reached by lord Kenyon. His lordship questioned the

distinction, because he was disposed to apply the doctrine which had so long prevailed in regard to personal estate, to real estate also. He would have had limitations of estates of inheritance, after a dying without leaving issue, valid as executory devises. But Mr. chief justice Savage, having arrived at the conclusion that the distinction taken in *Forth v. Chapman* was not well founded, and that the same words of limitation in a devise of real and personal property, could not pass an estate of inheritance in the one, and an estate not of inheritance in the other, and receive a consequent difference of construction, in regard to the future limitations, was also of opinion that upon the words, dying without leaving issue, there could be no executory devise of either species of property. Lord Kenyon thought that the words, dying without leaving issue, ought to create an executory devise in limitations of real property. Mr. chief justice Savage was of opinion that these words could receive no such construction in limitations either of real or personal property.

In the opinion delivered by the learned chief justice, he says, that "the decision of this case in the court below, rests upon the distinction taken in *Forth v. Chapman*, between the same words as applied to real and personal property. The word *leaving* was relied on in the argument, but not by his honour the chancellor; and the cases cited show, that that word was relied on in but few of them, and that both expressions, viz. *dying without issue* and *dying without leaving issue*, are considered as in truth they are, of exactly similar import." But in the case before the court, there was no occasion to apply the terms of the bequest to real property;—how then could that distinction have been in question? The only question before the court was whether the words of limitation were such as to take the case out of the ordinary rule; and the whole question was whether the word *leaving*, would have that effect. All the cases mentioned by the learned chancellor, were cited for the purpose of showing, that according to the established law of the land, limitations

of personal property, after the death of the first taker without leaving issue, were valid, notwithstanding a different rule prevailed in regard to estates of inheritance. He cites *Atkinson v. Hutchinson*, which was a case of personal property merely: *Goodtitle v. Pegden*, which was a bequest of a term; and many other cases of limitations of personalty, wholly inapplicable to the distinction: and *Forth v. Chapman* is referred to as showing the efficacy of the word *leaving*, in the same manner as if the different kinds of property had been devised in separate clauses.

But in those cases of wills where real and personal property were devised by the same words of limitation, when effect has been given to the limitation of personal property as an executory devise, the decision has always turned upon the efficacy of the word *leaving* and certain other terms, as having a different import from the words, *dying without issue*. Lord Eldon put the case of *Crooke v. De Vander* on this distinction. In *Beauclerk v. Dormer*, lord Hardwicke would have given effect to the limitation over of the personalty as an executory devise, if the word *leaving* had been the term employed.

But there are many cases in which limitations of personal property after dying without leaving issue, have been sustained.

In *Atkinson v. Hutchinson*,¹ the devise was of a term with a limitation over after a dying without leaving issue, and it was decided to be a good devise over. In *Sheppard v. Lessingham*,² there was a devise of bank stock to a daughter for life, remainder to such child or children of the daughter as should be living at her death; and if she should not leave any child, or if such child should die without issue, then to J. S., and the words "without issue" were construed "without leaving issue at her death," as it appeared to have been the intention to insert those words, by which the limitation would have been effectual.

¹ 3 P. Wins. 258.

² Amb. 122.

In *Lampley v. Blowen*,¹ A. H. by her will said: "I give to my nieces F. L. and A. F. each one-half of the produce of bank stock and to their issue, and if they shall happen to die before the legacy becomes due to her, *and leave no issue*, the share of her so dying shall go to the survivor." Lord Hardwicke said, according to the resolution in *Forth v. Chapman*, the words *leave no issue*, ought to be construed leaving no issue at the time of the death.

"In that case," (*Forth v. Chapman*) he said, "it was a mixed fund of both real and personal estate; the present is stronger, as it is merely a personal chattel."

In England and in the state of New York, all further questions respecting the meaning of the words dying without issue, *ex vi termini*, are at an end.

The act of 7 William 4 and 1 Vict. ch. 26, sect. 29, provides: "That in any devise or bequest of real or personal estate, the words 'die without issue,' or 'die without leaving issue,' or 'have no issue,' or any other words which may import either a want or failure of issue, of any person in his lifetime or at the time of his death, or an indefinite failure of his issue, shall be construed to mean a want or failure of issue in the lifetime or at the time of the death of such person, and not an indefinite failure of his issue, unless a contrary intention shall appear by the will, by reason of such person having a prior estate tail, or of a preceding gift being, without any implication arising from such words, a limitation of an estate tail to such person or issue or otherwise; provided, that this act shall not extend to cases where such words as aforesaid import, if no issue described in a preceding gift shall be born, or if there shall be no issue who shall live to attain the age or otherwise answer the description required for obtaining a vested estate by a preceding gift to such issue."

In the Revised Statutes of the State of New York, tit. 2, art. 1, sect. 22, it is provided, that where a remainder shall be limited to take effect on the death of any person without

¹ 3 Atk. 396.

heirs, or heirs of his body, or without issue, the word "heirs" or "issue" shall be construed to mean heirs or issue living at the death of the person named as ancestor.

The English and New York statutes differ in many important respects. By the English statute, all cases are exempted from its provisions, where a contrary intention shall appear by the will without any implication arising from the words denoting a want or a failure of issue. Such intention may be shown by reason of an estate tail to the first taker, or to his issue; and such an estate may arise from the application of the rule in Shelley's case, as where an estate for life is given to one, and after his decease to the heirs of his body, and if they shall die without issue, remainder over. In this case an estate tail is created, and the words are construed to mean an indefinite failure of issue. And the intention that the words should be construed to mean an indefinite failure of issue, may be "otherwise" shown in any manner except by implication from the words themselves.

The New York statute which abolishes the common law rule, makes no exceptions, and is applicable to all cases; and as the rule in Shelley's case is also abrogated, an estate tail can never be raised by implication, where after an estate for life or in fee is devised in terms, there is a limitation over after a dying without issue; however apparent it may be from a view of the whole will, that it was the intention of the testator to create an estate tail.

By the common law, though, an executory devise of personal property, in tail or in fee to one *in esse* after a dying without issue, is void; yet an executory devise for life to one *in esse*, to take place after a dying without issue, may be good.¹ In the state of New York since the statute, the limitation over can only take effect on the failure of issue at the time of the death; and if issue survived, the limitation over would fail.

S. F. D.

¹ *Oaks v. Chalfont*, Pollerf. 38. *King v. Collon*, 2 P. Wms. 608.

JURISPRUDENCE.

DIGEST OF ENGLISH CASES.

COMMON LAW.

[Selections from 2 Queen's Bench Reports (Adolphus & Ellis, New Series), Part 1;¹ 2 Gale & Davison, Part 5; 3 Manning & Granger, Part 3; 5 Scott's New Reports, Part 1; 10 Meeson & Welsby, Parts 4 and 5; 2 Dowling's Practice Cases (New Series), Part 3; and a selection from 1 Carrington & Marshman, Part 4;¹ all cases included in former digests being omitted.]

ACCOUNT STATED. (*Evidence of.*) Assumpsit by the executors of the payee of a promissory note, against the defendant as maker. The plaintiff produced the note with the following endorsement upon it, signed by the defendant and one of the plaintiffs:—"Hull, 1838. Memorandum, that the sum of 1*l.* 7*s.* 6*d.*, one quarter's interest, was paid on the within note. William Purdon, Thos. Purdon."

Held, that this was sufficient evidence of an account stated with the executors, without any proof of the time of the testator's death. *Purdon v. Purdon*, 10 M. & W. 562.

ADVOWSON. (*Advowson appendant, recovery of—Effect of erroneous recitals of title.*) A deed to lead the uses of a recovery by mistake treated an advowson as being in gross, when in fact it was appendant to a manor; and recited, that A., being seised of the manor and advowson, devised the manor and other estates,

¹ *Adolphus & Ellis*, (N. S.) vol. 1, and *Carrington & Marshman*, vol. 1, will be found reprinted in full in the forty-first volume of *English Common Law Reports*, now nearly ready for publication.

not including the advowson, to B. for life, with remainders for life and in tail, and devised the residue of his real estate to B. and C. in fee, as tenants in common; and that B., being seised in fee of a moiety of the advowson *so devised to him as aforesaid*, made his will, and devised his real estate to his widow for life, with remainder to M. for life, with remainder to his issue in tail: and the deed then proceeded to convey the manor with its appurtenances, and also (inter alia) *the moiety, formerly of the said B., of and in the advowson*, to a trustee for the purpose of making a tenant to the præcipe to suffer a recovery, to enure to the use of M. for life with remainder to his eldest son in fee. In fact, the will of A. contained a sufficient devise of the manor and the appendant advowson to B. for life, with remainders for life and in tail, and under this devise M. was in fact, at the date of the deed, tenant for life of the manor and advowson, with remainder to his eldest son in tail: and M., and his eldest son, were parties to the deed: Held that, although the premises in the recovery deed were in themselves large enough to have passed the whole advowson as appendant to the manor, yet that, by reason of the intention of the parties apparent on the face of the deed (although arising out of a mistake as to their title), the estate tail was not barred in one moiety of the advowson. *Moseley v. Motteux*, 10 M. & W. 533.

ARBITRATION. (*Action by arbitrator for costs of reference—*

Joint right of action.) An arbitrator may maintain an action on an express promise to pay him the costs of a reference. The following allegation of the consideration of such a promise, "in consideration that the plaintiffs, at the request of the defendants, would take upon themselves the burden of a reference," was held sufficient on special demurrer to the declaration. A declaration on a promise by the defendants to pay the arbitrators such costs, in such manner and at such times as the arbitrators should direct, stated that the arbitrators awarded that the defendants should pay a certain sum as costs immediately after the execution of the award, whereof the defendants had notice.

Held, on special demurrer, that the award was to be construed to mean that the costs were payable within a reasonable time after the execution of the award; that they were payable on notice, and

that it was not necessary that the declaration should aver a special request to pay.

A declaration stated that a cause was referred to the arbitration of A. and B., and such third person as they should appoint, or any two of them; that A. and B. appointed C., of which the defendant had notice, and that in consideration that A., B. and C., would take upon themselves the burden of a reference, the defendant promised to pay them their reasonable costs of the award, and that they proceeded and made their award, ordering defendant to pay them their costs.

Held, that the three arbitrators could sue on this as a joint contract. *Hoggins v. Gordon*, 2 G. & D. 656.

2. (*Duty of arbitrator, where costs are to abide the event.*) Where a cause, in which there are several issues, is referred to an arbitrator, and the costs of the cause are to abide the event of the award, the arbitrator must award specifically on each issue, and a general award, that the plaintiff had good cause of action against the defendant, and that the defendant should pay to the plaintiff a certain sum, together with the costs of the action and of the reference, is bad. *Bourke v. Lloyd*, 10 M. & W. 550; 2 D. P. C. (N. S.) 452.

3. (*Award—Certainty—Excess of authority.*) An action of trespass for an injury to the plaintiff's houses and lands was referred to an arbitrator, who was to settle at what price and on what terms the defendant should purchase the plaintiff's "property." The order of reference gave no power to the arbitrator to determine what the property in question was, nor was there any dispute on the subject. The arbitrator fixed a certain sum as the price at which the defendant should purchase the plaintiff's property, and ordered that the defendant might use the plaintiff's name to enforce certain rights and remedies: Held, that the award was not bad, on the ground of its not specifying what the property was, and that the arbitrator did not exceed his authority in awarding that the defendant should be entitled to use the plaintiff's name. *Round v. Hatton*, 10 M. & W. 660.

ARSON. Where a small faggot was set on fire on the boarded floor of a room, and the faggot was nearly consumed, the boards

of the floor were "scorched black, but not burnt," and no part of the wood of the floor was consumed, held not a sufficient burning to support an indictment for arson. (9 C. & P. 45.) *Reg. v. Russell*, 1 Car. & M. 541.

ATTORNEY. (*Privilege of.*) A plea by an attorney, defendant in an action in the common pleas, that he is an attorney of the queen's bench, and not of the common pleas, must be pleaded by attorney, and not in person. (3 Scott's N. R. 448.) *Groom v. Wortham*, 2 D. P. C. (N. S.) 657.

2. (*Arrest of, when privileged cundo.*) An attorney, plaintiff in a cause, was arrested while on his way from his house at Walworth to his office in Lincoln's Inn, to procure papers material to a motion which he expected to come on in his cause at Westminster, whither he intended afterwards to go: Held entitled to his discharge from the arrest, though he might have slightly digressed from the shortest path from his residence to his office.

Scoble, on an application by an attorney to have refunded to him money which he had paid under the duress of an improper arrest, it is not necessary that he should state that he is a practising attorney, duly authorized to practice, and that he had taken out his certificate for the current year. *Williams v. Webb*, 2 D. P. C. (N. S.) 660.

AUCTION. Debt.—The declaration alleged, that the plaintiff, being employed by the defendants to sell certain lands by auction, put up the same for sale, subject to a condition that the highest bidder should be the purchaser: that one H. was the highest bidder, and declared by the plaintiff to be the purchaser, whereby auction duty to the amount of 94*l.* 18*s.* 9*d.* became payable by the plaintiff, and was paid by him: breach, in nonpayment of that sum by the defendants. Plea, by one of the defendants, that it was a conditional sale, that the purchaser should after the sale pay the auction duty; that upon exposure to sale, and H. being the highest bidder, payment of the duty was then demanded of him by the plaintiff, and refused by him, whereby his bidding became null and void. Plea, by the other defendant, that the plaintiff at the time of the sale demanded payment of the duty from H., who refused to pay, and did not at the time of the sale or at any time since, pay the same, whereupon the defendants then declared the

said bidding and sale to be null and void, and the same became null and void. Replication, that before H. became a bidder, it was collusively agreed between him and the latter defendant, that H. should bid, not with a view of completing the purchase, but merely to outbid another bidder, and that H. did so bid; that the plaintiff at the time of the auction had no notice either of the said agreement or of the intent of H. becoming a bidder; that the plaintiff at the said auction, and whilst H. was the highest bidder, closed the biddings, and H. then became the highest bidder, and was declared to be the purchaser; that H. refused to pay the auction duty; and that before his bidding no notice was given to the plaintiff by H. or by the defendants of H.'s being appointed and having agreed to bid at the sale for the use and behoof of the defendants.

Held, first, that the declaration was good, and that the replication was not a departure from it.

Secondly, that the former plea was bad, as it did not show that the vendors had exercised their option of declaring the bidding to be null and void.

Thirdly, that the latter plea was bad, as it did not show that the vendors had, at the time and place of auction, exercised their option of declaring the bidding to be void, or had notified the same to the plaintiff.

Fourthly, that the 19 Geo. 3, c. 56, has not repealed the 7th sect. of 17 Geo. 3, c. 50. *Willson v. Carey*, 10 M. & W. 641.

BILLS AND NOTES. (*Alteration of bill after acceptance.*) To assumpsit by endorsee against acceptor upon a bill of exchange declared on a general acceptance, the defendant pleaded that he did not accept. At the trial, it appeared that the defendant's name was by his authority written across a blank stamp, and that the bill was afterwards filled up by the drawer, and the words "payable at the Bank of England" added, without the knowledge and assent of the defendant. At the trial, a verdict was by the judge's direction taken for the plaintiff, with leave to the defendant to move to enter a nonsuit if the court should be of opinion that the plaintiff was not entitled to recover: the court directed a nonsuit. *Crotty v. Hodges*, 5 Scott, N. R. 221.

2. (*Endorsement of overdue bill, effect of.*) The endorsee of an

overdue bill or note takes it subject to all the equities arising out of the bill or note transaction itself, but not subject to any collateral claim existing between the earlier parties to it. Therefore, to an action by the endorsee of an overdue note against the payee, a distinct debt due to the payee from a former endorsee cannot be set off. *Whitehead v. Walker*, 10 M. & W. 696.

3. (*Transfer of Bill in payment of debt—Pleading.*) In assumption for work and labour, &c., the defendants pleaded, that the promises in the declaration mentioned were made by them jointly with one T. M., and that after the making thereof, and before the commencement of the suit, to wit, on, &c. the plaintiff *for and on account* of 150*l.*, parcel, &c. and the said promises of the defendants and T. M. in respect thereof, made his bill of exchange, and directed the same to T. M., and thereby required him to pay to the plaintiff's order, three months after date, the said sum of 150*l.*, and the said T. M. for and on account of the said sum of 150*l.*, parcel, &c., and the said promises of the defendants and him the said T. M. in respect thereof, then accepted the said bill and delivered the same to the plaintiff, who took and received the same for and on account of the said sum of 150*l.*, parcel, &c., and the said promises, &c. Upon demurrer to this plea on the ground that it did not appear that the bill was not due before the commencement of the suit, or that the plaintiff had ever endorsed or transferred it over, or that it was not still unpaid in the hands of the plaintiff as holder: Held, that the plea was sufficient, inasmuch as the defendants could not know whether the plaintiff, had or had not transferred the bill, and that was a fact which ought to come from the plaintiff by way of replication. *Mercer v. Cheese*, 2 D. P. C. (N. S.) 619.

4. (*Promissory note, what is.*) The following document was held to be a promissory note, and not an agreement:—"W. W. lent to J. R. the sum of 19*l.* 19*s.* 11*d.* to receive five per cent. for the same; to pay on demand to said W. W., giving J. R. six months' notice for the same." *Walker v. Roberts*, 1 Carr. & M. 590.

BURGLARY. (*Local description.*) In an indictment for burglary it is sufficient to allege that the offence was committed at a place, naming it; *e. g.*, "at Norton, in the county aforesaid," without

statifying the place to be a parish, vill, chapelry, or the like. *Reg. v. Brookes*, 1 Carr. & M. 544.

COAL MINE. (*Trespass for severing coal from, measure of damages in.*) In trespass for severing and carrying away coal from the plaintiff's mine, the proper measure of damages in respect of the coal taken is its value as it existed as a chattel, that is, as soon as severed (5 M. & W. 351). *Morgan v. Powell*, 2 G. & D. 721.

CORPORATION. (*Remuneration of town-clerk.*) The town council of a borough resolved, "that one hundred guineas be fixed as the salary of the town-clerk for his attendance on the business of the council and committees, and that he be paid the usual charges in defending and bringing actions." On motion to review the town-clerk's bills: Held, that the master had proceeded on the right principle in considering the salary as a remuneration for all business, except the bringing and defending actions. *Thomas v. Mayor &c. of Swansea*, 2 D. P. C. (N. S.) 470.

2. (*Retainer by, must be under seal—Appropriation of payments.*) The retainer or appointment of an attorney by a corporation must be under their common seal. (6 M. & W. 815.)

In an action by an attorney against a municipal corporation for divers bills of costs, the cause was referred, and the arbitrator found that a certain sum of money had been paid to the plaintiff by virtue of a resolution of the town council, in part payment of his general account, and that the plaintiff had applied that money in discharge of two bills for business done, in respect of which he had no sufficient retainer, and in part discharge of a third bill for extra costs incurred by him in his capacity of town-clerk. The court held that such appropriation by the plaintiff was authorized, though he could not have recovered the amount of the two first named bills by an action at law. *Arnold v. Mayor &c. of Poole*, 2 D. P. C. (N. S.) 574.

COSTS. (*Of trial after special case argued.*) On the trial of a cause in which there were several issues, the plaintiff had a general verdict, leave being reserved to the defendants to move to enter a nonsuit, or a verdict for the defendants. A rule was obtained accordingly, and thereupon it was agreed, at the suggestion of the court, that the facts should be stated in a special case for the

opinion of the court. On the argument of the case, the court gave judgment for the defendants, and the verdict was accordingly entered for them, and this judgment was afterwards affirmed on error in the exchequer chamber: Held, that the defendants were entitled to the costs of the trial; and that although one of the issues was given up by them at the trial. *Tobin v. Crawford*, 10 M. & W. 602; 2 D. P. C. (N. S.) 541.

2. (*Security for.*) The court discharged a rule for security for costs, on the plaintiff, who was resident out of the jurisdiction, consenting to set off any costs to which he might become liable in the action, against a judgment obtained by him against the defendant. *Bristowe v. Needham*, 2 D. P. C. (N. S.) 658.

COVENANT. (*Breach of covenant to insure against fire—Measure of damages.*) Plaintiff, a lessee under covenant to insure against fire, in his own name and that of the lessor jointly, assigned to defendant, who covenanted to keep the covenants in the lease. The defendant having neglected to keep up a fire policy which had been effected, the plaintiff effected a fresh one, but in his own name only. No fire happened; the plaintiff brought covenant against the defendant for neglecting to insure. Defendant pleaded payment of a farthing into court: Held, though the plaintiff had no claim to be indemnified specifically for the sum expended by him in effecting the fresh policy, the jury were at liberty to award more than nominal damages for the risk to which he had been exposed by the defendant's default. *Hay v. Wyche*, 2 G. & D. 569.

DEMURRAGE. (*Computation of lay days.*) By the stipulations of a charterparty, the vessel was to take in a cargo of coal at Newcastle, and proceed therewith to London, or as near thereto as she could safely get, and deliver the same to the freighters or their assigns, &c.; to be delivered in five working days, demurrage over and above the said lying days 2*l.* per day. The vessel arrived in the port of London, off Gravesend, on the 9th March, and on the 10th the cargo was sold, and the vessel entered by the freighters for a meter. On the 20th she received an order from the harbour-master to proceed to the Pool: on Monday, the 22d, she commenced working out her cargo, and was cleared on the 27th. It appeared that in consequence of the factor's certificate

that she was a metered vessel, the harbour-master had detained her at Gravesend till the 20th, when her turn arrived for her to proceed to the Pool and discharge her cargo; that if she had not been on the meter's list this regulation would not have applied, and she might have proceeded to the Pool at once; that it was occasionally the practice for factors not to enter such vessels in the meter's list, but that it was desirable that the cargo should be sold, subject to metage by a sworn meter:

Held, that under these circumstances the vessel was not to be considered as having arrived at her place of discharge until the 20th, and therefore that the lying days did not begin to count till then. *Kell v. Anderson*, 10 M. & W. 498.

EJECTMENT. (*Service.*) The tenant having absconded, leaving the key of the premises with his attorney, to whom he by letter referred the landlord: Held, that service of the declaration and notice by affixing a copy on the door of the premises, and by delivering another copy to the attorney, was sufficient to entitle the landlord to judgment against the casual ejector. *Doe d. Dovaston v. Roe*, 5 Scott, N. R. 174.

2. (*Same.*) Service of the copy of the declaration and a notice on the niece of the tenant on the premises, on Saturday, the 21st May, with a subsequent statement by her (she refusing to make an affidavit), that she gave it to the tenant on that or the following day, Monday the 23d being the first day of term: Held insufficient for a rule nisi. *Doe d. Hine v. Roe*, 5 Scott, N. R. 174.

3. (*What tenancy is within 1 Geo. 4, c. 87.*) Where a person held premises under an agreement in writing, from quarter to quarter, and the agreement provided that the tenant should quit possession upon receiving six months' notice in writing, and in the event of his losing his license to sell ale, &c., through misconduct at any time during the term, should then forthwith quit possession, on being requested so to do by his landlord: Held, that he had neither a tenancy from year to year, nor a term certain in the premises, within 1 Geo. 4, c. 87, s. 1, so as to entitle the landlord in ejectment to compel him to give security for costs under that act. *Doe d. Carter v. Roe*, 10 M. & W. 670; 2 D. P. C. (N. S.) 449.

4. (*Service.*) Where it appeared that at the time of serving the

declaration and notice the name of the tenant in possession was not known, but a person on the premises came forward and said he was the tenant, but refused to give his name, and the name of the original lessee was then filled in, and the tenant was served, the court granted a rule nisi. *Doe d. Fitzwygram v. Roe*, 2 D. P. C. (N. S.) 672.

EMBEZZLEMENT. (*Indictment.*) An indictment for embezzlement, which charges, in one count, that within six calendar months the prisoner received three sums, laying a day to the receipt of each, and that "on the several days aforesaid" the defendant embezzled these several sums, is bad on demurrer, as not showing that the sums were embezzled within six months of each other.

Quære, whether several acts of embezzlement can be charged in one count of an indictment. *Reg. v. Purchase*, 1 Carr. & M. 617.

ESTATE TAIL. (*Determination of base fee by entry of issue in tail—Remitter—Statute of limitations.*) By marriage settlement, purporting to be made in pursuance of articles recited in it, an estate was conveyed to the husband and wife, and the heirs of their bodies: Held, that they thereby became tenants in tail special, and that a court of law could not construe the deed as making them tenants for life, with remainder to their issue in tail, even supposing that such be the construction to be put upon the articles by a court of equity.

An estate being limited by marriage settlement to the use of A. and his wife and the heirs of their bodies, and A. having died, leaving his widow and three children, viz. G. and an only son and L. and H. daughters, the widow, in 1735, by deed poll, in consideration of an annuity granted to her by her son, and of natural affection, "granted, surrendered, and yielded up" the estate in question to the son in fee; and he afterwards, during her life, suffered a recovery. The widow died in 1767; G. died without issue in 1779, having devised the estate to trustees to secure the payment of an annuity to W., the only son of his sister L. (who was then dead), and subject thereto to B. the eldest son of W., for his life, with remainder to the defendant, his second son. In 1790, B. entered, on his father's death, into possession of the

entirety of the estate, claiming under the will of G., and subsequently did various acts in the character of devisee for life; in 1814 he suffered a recovery of one moiety, and in 1816 conveyed the entirety of the estate to mortgagees in fee. In 1818, M., the descendant of the other coparcener, H., at the request of B. suffered a recovery of a moiety, which it was declared should enure (subject to a term to secure a sum of money to M.) to the use of B.'s mortgagees.

Held, first, that the deed-poll of 1735 operated as a covenant to stand seised, and created a base fee, determinable by the entry of the issue in tail:

Secondly, that although G., being estopped by the recovery suffered by him, was not remitted to the estate tail, yet, for the same reason, no right of entry accrued until his death, and therefore the period of twenty years, for the operation of the statute of limitations against the issue in tail, was to be calculated from his death in 1779, and not from the death of his mother in 1767; consequently, that the entry of B. (in 1790) was not barred by lapse of time:

Thirdly, that although B. entered under the will, and indicated an intention to take the estate under it for his life only, this intention was immaterial, and he was remitted, *nolens volens*, as to his moiety, to the original estate tail, which was barred by the recovery of 1814: and

Fourthly, that either his possession enured to the benefit of his coparcener M., so as to render the recovery of 1818 effectual as to the other moiety, or operated to confer on him, B., an estate in fee by wrong, which, being conveyed to the mortgagees in 1816, gave them a good title against the defendant, who claimed as devisee under the will of G. *Doe d. Daniell v. Woodroffe*, 10 M. & W. 608.

EVIDENCE. (*Notice to produce.*) An action on a bond of indemnity stood for trial at the Flintshire assizes: the commission day was on the 27th July; the cause was tried on the 29th. At 10 a. m. on the 28th, a notice to produce the bond was served on the defendant's attorney in the action (who resided in London) in the defendant's presence, in the assize town. The bond was in the possession of one W., who held it as the representative of a former

attorney of the obligors, and was himself the defendant's general attorney, and who had undertaken to produce it at the trial, if the judge should think he was bound to do so. Before the assizes, the bond had been sent by W. to the defendant's attorney in the action in London, for the purposes of inspection and admission under a judge's order; and the plaintiff's attorney had there taken a correct copy of it. At the trial W. had the bond in court, but objected to produce it on the ground of privilege, and the objection was allowed.

Held, first, that the notice to produce the deed was sufficient, under the circumstances, to let in secondary evidence of it; secondly, that the copy so taken by the plaintiff's attorney was admissible as such evidence. *Lloyd v. Mostyn*, 10 M. & W. 478; 2 D. P. C. (N. S.) 476.

2. (*Declaration of deceased collector of rents—Limitation act.*) *Quere*, whether a verbal statement made by a deceased collector of rents, at the time of paying over to his employer moneys received by him from the tenants, as to the person from whom he received a particular sum entered by him in the rental, is admissible in evidence against that person?

Construction of a document given in evidence as an acknowledgment of title under the stat. 3 & 4 Will. 4, c. 27, s. 17. *Furdon v. Clogg*, 10 M. & W. 572.

EVIDENCE IN CRIMINAL CASES. (*Confession.*) A female servant being suspected of stealing money, her mistress told her (on a Monday) she would forgive her if she told the truth. On the Tuesday she was taken before a magistrate and discharged, nobody appearing against her. On the Wednesday a constable went with her mistress to the prisoner, and told her in the mistress's presence "that she was not bound to say anything unless she liked, and that if she had anything to say her mistress would hear her." A statement thereupon made by the prisoner was held not to be receivable in evidence.—(8 C. & P. 733.) *Reg. v. Hewett*, 1 Carr. & M. 534.

2. (*Statement of prosecutrix, on indictment for rape.*) In a case of rape, a person to whom the prosecutrix made a statement recently after the offence, may be asked whether she named "a person" as having committed it, but not *whose* name she mentioned.

6 C. & P. 397; 9 C. & P. 471.—*Reg. v. Osborne*, 1 Carr. & M. 622.

3. (*Cross-examination.*) A witness for the prosecution in a case of felony, may be asked in cross-examination, whether he did not state certain facts.

FACTOR. (*Pledge of dock-warrants by.*) To an action of trover for sixteen bales of silk, the defendant pleaded, first, not guilty; secondly, that the plaintiffs were not possessed; thirdly, as to four bales, that D. A. & Co. were the factors and agents of the plaintiffs; that at the time of the delivery of the dock-warrants thereafter mentioned, the four bales of silk were deposited in the warehouse of St. Katherine's Dock Company; and the said D. A. & Co. were before and at the time of the pledge and delivery of the dock-warrants thereafter next mentioned, *as such factors and agents, intrusted by the plaintiffs with and were then in possession of* four dock-warrants for the delivery of the said four bales of silk; that D. A. & Co., *being so intrusted with and in possession of the said dock-warrants*, applied to the defendant for the loan and advance of 1900*l.* upon the pledge of the said four bales of silk as a security for the repayment of the said sum of money, and thereupon, to wit, on the 7th October, 1836, it was agreed between the defendant and D. A. & Co. that D. A. & Co. should pledge with the defendant the said four bales of silk as a security for the said sum of money to be advanced by the defendant, and which said sum of money the defendant then agreed to advance to D. A. & Co. upon the faith of the said dock-warrants; that D. A. & Co. *being so intrusted with and in possession of the said dock-warrants*, in pursuance of the said agreement *did deliver to the defendant the said dock-warrants*, and did pledge with the defendant the said four bales of silk *as a security for the said sum of money, and which said sum of money the defendant did then and there advance and lend to the said D. A. & Co. upon the faith of the said four dock-warrants*, and that the defendant had not notice that D. A. & Co. were not the actual and *bonâ fide* proprietors of the said four bales of silk, &c. To this plea the plaintiffs replied, that *the defendant did not advance or lend to D. A. & Co. the sum of 1900*l.* upon the faith of the said dock-warrants* in that plea mentioned, *in manner and form* as in that plea alleged.

The fourth, fifth, and seventh pleas, as to *fourteen* bales and *sixteen* bales respectively, were similar to the third, and similar replication was pleaded to each of them as to that plea.

The sixth and eighth pleas justified the detaining of the silks in pleas respectively mentioned upon a pledge by D. A. & Co., under the provisions of the third section of the Factors' Act, 6 Geo. 4, c. 94, the pleas alleging that the plaintiffs before and at the time of the pledge were indebted to D. A. & Co. as their factors and agents, in a sum which was still unpaid, and for which they had a lien on the silks, and that D. A. & Co. pledged the same to the defendant as a security for money then due to him from them. The replications to these pleas denied that the plaintiffs were indebted to D. A. & Co. At the trial it appeared that the *four* warrants mentioned in the third plea were on the 7th October delivered by D. A. & Co. to the defendant in exchange for other warrants belonging to other persons upon which previous advances had been made by him to them, no further advance being made on that occasion: Held, that this was not a pledge within the protection of the second section of the 6th Geo. 4, c. 94, and consequently the plaintiffs were entitled to a verdict upon that issue.

As to the fourth issue, it appeared that ten dock-warrants were handed by D. A. & Co. to the defendant on Monday the 17th October, pursuant to an agreement to that effect, as a security for a sum of 3000*l.*, which he had advanced to them on the 15th; and as to the fifth issue, the two other warrants were in a like manner handed by D. A. & Co. to the defendant on Monday the 24th as a security for 2000*l.* advanced to them on the 22d, *none of these warrants having been in existence until the days on which they were respectively delivered to the defendant*; and as to the seventh issue the question was, whether the defendant was entitled to retain the whole sixteen warrants as a security for advances of 1400*l.* and 500*l.* made on the 5th and 10th November upon the warrants then in the defendant's hands: Held, the allegation in each of these pleas, that the factors were at the time of the respective pledges *intrusted with* and *in possession of* the several dock-warrants upon which the advances were alleged to have been made, being a material allegation and not traversed, was for the purpose of each of these pleas admitted, so as to require no

evidence on the part of the defendant to sustain it, and to admit of none on the plaintiffs' part to controvert it, and consequently that the defendant was entitled to the verdict upon those three issues.

As to the sixth and eighth issues, the jury giving the plaintiffs credit in the account for moneys received by D. A. & Co. on two former wrongful pledges of the plaintiffs' goods, found that, at the times of the respective pledges to the defendant the plaintiffs were not indebted to their factors, and accordingly returned a verdict for the plaintiffs upon those two issues. The court refused to disturb that verdict.

But conceiving that the justice of the case required that the plaintiffs should have an opportunity to put in issue the possession of the factors and their being intrusted with the dock-warrants at the time the respective pledges were made, the court gave them the option of amending their replication and going to a new trial on payment of costs. (6 M. & W. 572; 9 M. & W. 647.) *Bonsi v. Stewart*, 5 Scott, N. R. 1.

FALSE PRETENCES. The defendant falsely stated to the prosecutor that he was Mr. H., who had cured a female at the Oxford Infirmary, and thereby induced the prosecutor to buy for 5s. a bottle containing a liquid which he said would cure the eye of the prosecutor's child: Held, a false pretence within the 7 & 8 Geo. 4, c. 29, s. 53. *Reg. v. Bloomfield*, 1 Carr. & M. 537.

FOREIGN TRADE. (*Authority of superintendents of trade at China—Pleading.*) Declaration on an assumpsit of the defendants to deliver goods of the plaintiffs at the port of Canton, all and every dangers and accidents of the seas and navigation of what nature or kind soever excepted, unto certain persons, to wit, Messrs. E. & Co.; that the defendants received the goods on board their ship, but, disregarding their promise, did not nor would deliver or cause to be delivered the said goods at the port of Canton, &c., although not prevented, &c., &c. Plea, that after the making of the promises, &c., the ship of the defendants proceeded on its voyage to Canton, and within a reasonable time the said ship, with the plaintiff's goods on board, arrived near to the said port of Canton, to wit, on the high seas there adjacent; and that afterwards certain persons, being officers of our lady the queen, duly authorized in that behalf, and then exercising the power of

her majesty's government there, to wit, one C. E., then being chief superintendent of the trade of her majesty's subjects to and from the dominions of the emperor of China, according to the statute (2 & 3 Will. 4, c. 93, ss. 5 and 6), and one S., then being captain of H. M. ship *Volage*, and then being the commander of her majesty's naval forces there, did, for divers good and sufficient and lawful causes and reasons, forcibly interrupt the said ship from further proceeding on its said voyage to Canton, and did prohibit, prevent and discharge the said ship from proceeding to Canton aforesaid, and did, by virtue of the powers and authority committed to them, and by means of her majesty's naval forces, and by the force and duress thereof, forcibly constrain and compel the said ship, and from thence continually have constrained and compelled her, not to proceed to Canton aforesaid, and thereby prevented the defendants from delivering the said goods at Canton aforesaid.

Held, on special demurrer, that the plea was bad, for that it did not sufficiently disclose the lawful authority of C. E. and S., as the chief superintendent of trade, and as commander of her majesty's naval forces, to prohibit or prevent the ship from proceeding to Canton; and that although, by stat. 3 & 4 Will. 4, c. 93, s. 5, the king is authorized to appoint superintendents of trade in China, and by s. 6 his majesty in council may issue orders and commissions to give the superintendent powers over the trade of British subjects in any part of the Chinese dominions, yet that the exercise of that authority not being stated, it could not be inferred in favour of the defendants, so as to dissolve or suspend the contract. *Evans v. Hutton*, 2 D. P. C. (N. S.) 600.

FORGERY. (*Request for goods.*) If the course of dealing between A. & B. is that A. shall write the names of persons in a list, with a sum against each name, on sight of which B. shall furnish goods on A.'s credit to each of those persons, to the amount set against his name, such list is a request for the delivery of goods, the fraudulent alteration of which is indictable as forgery. *Reg. v. Walters*, 1 Carr. & M. 588.

2. (*Order for the payment of money.*) D. was in the habit of buying bones for F., and of drawing on F. for the price before he delivered the bones. The defendant forged D.'s name to a letter

to F., asking for 3*l.*, and stating that he had bought a large quantity of bones. F. did not then owe D. any money: Held, that this was not an order for the payment of money, within the stat.

1 Will. 4, c. 66, s. 2. *Reg. v. Roberts*, 1 Carr. & M. 652.

GAOLER. (*Detention of dead body by.*) Where a gaoler refused to deliver up the body of a person who had died whilst a prisoner in execution in his custody, to the executors of the deceased, unless they would satisfy certain claims made against the deceased by the gaoler, the court of queen's bench issued a mandamus peremptory in the first instance, commanding that the body should be delivered up to the executors. *Reg. v. Fox*, 2 Q. B. 246. And his act was held indictable. *Reg. v. Scott*, *ib.* 248, note.

HOUSEBREAKING. (*Local description.*) An indictment for breaking into a warehouse and stealing goods therein, stated the offence to have been committed "in the parish of St. Peter the Great, in the county of Worcester." In fact a part only of the parish was in the county of Worcester: Held, that the indictment could be supported for the simple larceny only. *Reg. v. Brookes*, 1 Carr. & M. 543.

INDICTMENT. (*For conspiracy, when too general.*) An indictment for a conspiracy to obtain goods by false pretences, did not state whose property the goods were which it was the object of the conspiracy to obtain: Held, bad in arrest of judgment. (2 B. & Ald. 201; 1 M. & Rob. 402; 9 Ad. & E. 686; 10 Ad. & E. 34.) *Reg. v. Parker*, 2 G. & D. 709.

2. (*Statement of property in goods stolen from a dead body.*) A chattel was stolen from the pocket of A., as his dead body lay in a road, in the diocese of W. His last place of abode was in the diocese of G., but there was evidence that he had left it to come to live in the diocese of W.: Held, that this was sufficient to sustain a count laying the property in the bishop of W. *Reg. v. Tippin*, 1 Carr. & M. 545.

3. (*For assault with intent to rob.*) An indictment charging that the defendant in and upon A. B. feloniously did make an assault, "with intent the moneys, goods and chattels of the said A. B., from the person and against the will of the said A. B., then and there feloniously and violently to rob, steal, take and carry away, against the form of the statute," &c., is good. *Reg. v. Huxley*, 1 Carr. & M. 596.

INFANTICIDE. If a child has been wholly produced from the body of its mother, and have an independent circulation, the wilful killing of it by her is murder, although it be still attached to her by the umbilical cord. (5 C. & P. 539; 7 C. & P. 814.) *Reg. v. Trilloe*, 1 Carr. & M. 650.

LANDLORD AND TENANT. (*Evidence of tenancy from year to year.*) In debt for rent, stating a demise of a messuage, &c. by the plaintiff to W. H., for one year, and so on from year to year, if they should respectively please, at the yearly rent of 140*l.*, payable quarterly, and an assignment by W. H. to the defendant, the plaintiff proved an agreement (signed by himself only) for a lease of the premises by him to W. H. for seven years, at 140*l.* a year; that no lease had been actually executed, but that W. H. had entered into possession shortly after the date of the agreement, and had paid two quarters' rent, at the rate of 140*l.* a year: Held, that this was sufficient evidence of a tenancy from year to year, as stated in the declaration, and in which W. H. had an assignable interest. *Braythwayte v. Hitchcock*, 10 M. & W. 494.

2. (*Sale by landlord under distress.*) *Quære*, whether a landlord, who has seised his tenant's hay and straw under a distress for rent, may sell it subject to a condition that the purchaser shall consume it on the premises, according to the custom of the country. (8 M. & W. 419.) *Frusher v. Lee*, 10 M. & W. 709.

LARCENY. A. employed B. to take a canal boat from S. to E., paid him his wages in advance, and gave him besides three sovereigns to pay the tonnage dues. B. took the boat part of the way, paid tonnage dues to the amount of 2*l.*, and appropriated the remaining sovereign to his own use: Held, a larceny. *Reg. v. Goode*, 1 Carr. & M. 582.

2. A servant was sent with 6*s.* to buy twelve hundred weight of coals. He bought a smaller quantity, for which he paid 3*s.* 3*d.*, and appropriated one of the shillings to his own use: Held, a larceny. *Reg. v. Beaman*, 1 Carr. & M. 595.

3. The prisoner was employed by the prosecutor to drive six pigs from C. to U., not being otherwise in his service. On the way, he left one at Mr. M.'s house, stating that it was tired, and told the prosecutor he had done so. The prosecutor desired the prisoner to go and ask Mr. M. to keep the pig for him. The pri-

soner went to Mr. M.'s, and sold the pig to him, and appropriated the money: Held, no larceny of the pig. *Reg. v. Jones*, 1 Carr. & M. 611.

4. A. delivered a waistcoat to the defendant, to take it to B. to be washed. The defendant delivered it to B. as his own. B. having washed it, returned it to him, and he converted it to his own use: Held, no larceny, unless at the time when the defendant received it from A., he intended to steal it. *Reg. v. Evans*, 1 Carr. & M. 632.

LIBEL. (*Actionable words.*) The defendant published a placard stating of the plaintiff, who was an overseer of the poor, "that when out of office he had advocated low rates, and when in office had advocated high rates, and that he (the defendant) would not trust him with 5*l.* of his property:" Held, that these words were actionable *per se*, without any innuendo. *Cheese v. Scales*, 10 M. & W. 488.

LIMITATIONS, STATUTE OF. (*Acknowledgment.*) A letter written before the expiration of six years from the accruing of the debt, containing the following passages, held to take the case out of the statute of limitations, "I do not desire that you or any one of my creditors should lose what I owe them,—on the contrary, it is very much my wish not only to pay my debts, but interest upon them if I can. As you have mentioned to Mr. Anderton the limitations act, I answer at once that I am ready to put it out of my power to take advantage of that act, and will immediately give you my note to pay the amount that is due to you. To pay you now or within the year I am utterly unable. I really have not, as you imagine, received 600*l.* for," &c. "It is of course indispensable that the exact sums I owe you should be fixed, whether you accept my note or not." (The letter then stated several objections to the amount of the claim.) "Under these circumstances you will perhaps state what deduction you are prepared to make, and I shall be glad if it be such as will allow me, with justice to my other creditors, to give you my note for the amount, or if it be possible to borrow the amount from a friend, which I have a hope of doing, and wipe the account entirely out of your books. I will not close this letter without repeating that I am fully sensible and thankful for the forbearance

you have shown; but I cannot move a step in the way to give you satisfaction, and do justice to my other creditors, until the sum actually due to you be ascertained." *Gardner v. M'Mahon*, 2 G. & D. 593.

LONDON, CITY OF. (*Customs of—Right to support a party-wall—Award, when sufficiently final.*) The declaration stated, that the plaintiff was in possession of a house in London, in which he carried on a certain trade, and the defendants of a house next adjoining the plaintiff's house; that the defendants were purposing to pull down their said house and also seven others adjoining and near thereto, and to erect another on the site of their first-mentioned house, and preparatory to their so doing erected and placed a certain hoarding in front of their said houses in such a manner that the said hoarding enclosed a part of a public footway running in front of the said house of the plaintiff and defendants respectively, and thereby in part obstructed the said footway and the approach to the plaintiff's house and the passage of persons passing and repassing on foot on the side of the said street on which the plaintiff's house was situate; that the defendants afterwards pulled down their eight houses and erected on the site of their first-mentioned house another house adjoining to the house of the plaintiff; yet the defendants, contriving, &c. wrongfully, &c. injuriously and without any reasonable or probable cause, delayed and retarded the pulling down of the said eight houses and rebuilding their said first-mentioned house for an unreasonable long time, to wit, three years after they so erected the said hoarding, and on that account wrongfully, wilfully and injuriously kept and continued the said hoarding so erected and placed as aforesaid, and so obstructing the said footway and the approach to the plaintiff's said house as aforesaid for a long and unreasonable time, to wit, &c., whereby customers were hindered and prevented from frequenting the plaintiff's house in the way of his said business, &c.* And the defendants further contriving, &c., by their agents and workmen in that behalf, behaved and conducted themselves so carelessly, negligently and improperly in pulling down the said first-mentioned house which adjoined the said house of the plaintiff, that by and through the carelessness, negligence and improper conduct of the defendants and their agents and servants in

that behalf in pulling down the said first-mentioned house of the defendants, and in neglecting to use reasonable and proper precaution in that behalf, divers large quantities of bricks, tiles, &c., fell from the last-mentioned house into and upon divers parts of the plaintiff's house, and upon and through divers skylights, &c., breaking the glass and damaging goods, &c.* * And the defendants further contriving, &c., by their agents and workmen in that behalf, behaved and conducted themselves so carelessly, negligently and improperly in and about digging and clearing the ground for the foundation of the said house so built on the site of their first-mentioned house as aforesaid, and in and about underpinning the party-wall between that house and the house of the plaintiff, and in and about removing a certain part of the said party-wall, and in shoring up the said party-wall, and in doing other works to the said party-wall and connected therewith, that by and through the carelessness, negligence and unskilfulness of the defendants and their agents and workmen in the premises last aforesaid, the said party-wall, and all the walls, floors, &c. of the plaintiff's house greatly sunk, cracked, &c. and the house was damaged and lessened in value, &c.

The defendants pleaded, first, not guilty; secondly, (as to so much of the declaration as related to the keeping and continuing of the hoarding so erected and placed as in the declaration mentioned, and so obstructing the footway and the approach to the plaintiff's house for the space of time in the declaration mentioned,) that from time whereof, &c. there had been and was, and from thence hitherto hath been and still is in the city of London a certain ancient and laudable custom there used and approved of, that is to say, that if any person or persons, body corporate or politic, hath or have at any one time or times during the time aforesaid had occasion to erect or pull down any building or buildings within the said city, near to any public way within the said city, and hath or have had occasion for those or either of those purposes to erect, place and continue any hoarding in such manner as thereby to obstruct or enclose any part of any public way within the city, and hath or have applied to the lord mayor of the said city for the time being for his permission, license or authority to erect, place and continue such hoarding in such manner and for

such purpose or purposes as aforesaid, such lord mayor for the time being of such city hath during all the time aforesaid had full and free power and authority to authorize, license and permit, and hath lawfully authorized, licensed and permitted, and been used and accustomed to license, authorize and permit such person or persons, body corporate or politic, to erect, place or continue such hoarding for such purpose or purposes aforesaid, and of such dimensions, and in such manner, and for such time or times as he hath thought reasonable or proper for such purpose or purposes, and the person or persons, body corporate or politic, so applying and having obtained such permission, license or authority as aforesaid, hath and have during all the time aforesaid lawfully and of right erected, placed and continued, and been used and accustomed of right to erect, place and continue for such purpose or purposes in any such public way, so as to enclose or obstruct the same, such hoarding in such manner and of such dimensions, and for such time or times, as he or they have been authorized, licensed and permitted to do by the said lord mayor for the time being of the said city as aforesaid, except so far as such custom, power or authority hath been affected by the statute 57 Geo. 3, c. xxix. The plea then proceeded to justify the placing and continuing the hoarding under license from the lord mayor and from the surveyor of pavements under the act referred to. To this plea defendants, protesting that there was not nor is such custom as in that plea mentioned, replied *de injuriâ*.

At the trial a verdict was taken for the plaintiff, by consent, subject to the award, order, arbitrament, final end, and determination of a barrister, who was by the order of *nisi prius* empowered to direct "that a nonsuit should be entered, or that a verdict should be entered for the plaintiffs or defendants, as he should think proper, and who was, at the request of either party, to state any point of law upon the face of his award for the opinion of the court: Held, first, that the charge in the declaration between * and **, not being of mere omission, but of positive carelessness, inducing injury to the plaintiff, constituted a good cause of action; secondly, the issue on the second plea being found for the defendants: Held (on motion for judgment *non obstante veredicto*), that there was nothing unreasonable in the custom therein alleged, and

that the plea was sufficiently proved by the production of the license from the lord mayor, for the erection before the defendant's premises of "a board, containing in front sixty-four feet, projecting from the same four feet, and to continue four weeks," and a license from the surveyor of the pavements "to erect and continue *four boards* in manner and for the time above mentioned." Thirdly, that it was not incumbent on the arbitrator to decide finally as to the amount of damages to be recovered, and to direct how the judgment should be entered up; but that, having by his award disposed of all the issues joined on the record, and assessed damages separately in respect of each subject-matter of complaint stated in the declaration, and having referred to the court, at the request of the defendants, the question as to the right of the plaintiff to recover damages in respect of some of the grievances stated in the declaration, and at the request of the plaintiff, as to the validity of the second plea and the custom therein set out, and also as to the plaintiff's right to judgment non obstante veredicto on the second plea, should the issue be found for the defendants, he had properly discharged his duty, and that he was not bound definitively to determine as to the validity or invalidity of the custom. Fourthly, the arbitrator having as to the party-wall found "that the carelessness, negligence and unskilfulness of the defendants and their agents in and about the underpinning of the party-wall, consisted of their underpinning the party-wall partially, and not underpinning the whole of the said wall, whereby the plaintiff's house sunk and sustained damage, and that the plaintiff's house was and is an ancient house, and had been and was entitled to be supported at the east end thereof by the said party-wall:" Held, that the defendants had no right to underpin the party-wall either partially or wholly, unless that could be done without injury to the plaintiff's house, and that whether the plaintiff had a several interest in that half of the wall which was next to his house, or whether he and the defendants were tenants in common of the whole, an action on the case was maintainable against the latter in respect of the injury resulting from their mode of dealing with it: And held, that as the second plea was pleaded generally as to the keeping and continuing the hoarding erected as in the declaration mentioned, the plaintiff was not entitled to damages in respect

of the maintenance of that boarding, nor to recover in respect of damages sustained by reason of the delay in pulling down and rebuilding the defendants' premises, otherwise than by keeping and continuing of the boarding. *Bradbee v. Mayor, &c., of London*, 5 Scott, N. R. 79.

2. (*Privileges of tackle-house porters.*) In an action upon the case brought to assert a right claimed by the tackle-house porters of the city of London to the landing and portorage of certain goods imported into the port of London, the declaration alleged, "that from the time whereof the memory of man was not to the contrary, the mayor and commonalty and citizens of the city of London had had, and had been used and accustomed to have, and ought of right to have had, and still of right ought to have, by themselves and the persons by them in that behalf deputed, appointed and permitted, the work and labour of unshipping, landing, carrying and loading, *except to the houses of aliens*, of all goods, wares and merchandises, imported into the port of London, *and not consigned to aliens or an alien*, for reasonable reward in that behalf."

In order to sustain this allegation, the plaintiff produced in evidence several acts or ordinances of common council regulating and defining the rights and duties of the tackle-house porters, the ticket porters, and the porters to the packers (or alien porters), respectively, amongst others, an act of the 6th of March, 1607, which, reciting "that the freemen tackle-house porters and street porters had vehemently complained against the porters under the packer of the said city, for that they of late time had, contrary to usage, intruded into the labour and business of packing, shipping and unshipping, lading and taking up, as well of the goods of English merchants as of strangers, where they had been accustomed to deal only in the labour of packing, shipping and unshipping, lading and taking up of *the goods and merchandises of merchant strangers*," enacts "that the porters to the packer of goods of merchant strangers in the said city shall not in anywise intermeddle or deal with the shipping, unshipping, &c., of any manner of goods, wares or merchandises, of any merchant or merchants, or of any other person or persons whatsoever English born, that is or shall be free of the said city or not free, but shall

content themselves with the labour of packing, shipping, unshipping, &c., of *the goods, wares, merchandises of merchant strangers only.*" He also produced an inspeximus charter of Charles the First, by which were granted or confirmed to the mayor, aldermen, and commonalty of the city of London, amongst other things, "*the offices and occupations of the carriage and portage of all wools, &c., and all other merchandises whatsoever, as well of denizens, whose fathers are, were, or should be born out of the limits of our allegiance, which shall be carried into London from the river of Thames to the house of such alien, and from thence to the same river;*" and it was amongst other things ordered, "*that no other carrier or porter, or any person whatsoever, shall intrude or interfere in carrying or lading any such goods or merchandise from any wharf or shore within the limits aforesaid to any ship or vessel, or to unlade any goods or merchandises from any ship or vessel upon any wharf, shore, or land, within the limits aforesaid, without the special appointment or license of the said mayor, &c.; and that the carriers or porters appointed by the mayor, &c., may take and receive from the like merchants, as well aliens born in parts beyond the seas, as of the like denizens born within the dominions, &c., whose fathers were aliens born without the limits of our allegiance, for the carriage and portage of the like goods, such sums of money as are mentioned in a schedule annexed to these presents.*" It was also proved, that, as far back as living memory extended, wherever goods belonging to an alien had been imported into the port of London, consigned to an English merchant, the tackle-house porters had taken them; but that if the alien porters came and disputed their right, and upon inquiry, it turned out that the goods were *the goods of an alien*, then the alien porters took them: Held, that this evidence did not sustain the declaration, inasmuch as it showed that the rights granted or confirmed to the city by the charter of Charles the First were not confined to goods landed and sent *to the houses of aliens*, but extended to *all goods of aliens imported into the port of London*, as to which the rights of unshipping and portage formerly existing in the appointees of the corporation were abolished by 3 & 4 Will. 4, c. 66, and the agreement made in pursuance of that statute. *Collyer v. Stennett*, 5 Scott's N. R. 34.

MANSLAUGHTER. (*Conriction for assault, under 1 Vict. c. 85, s. 11.*) On an indictment for manslaughter, the defendant cannot be convicted of any assault which did not conduce to the death, though the death itself was not manslaughter. *Reg. v. Crumpton*, 1 Carr. & M. 597.

MORTGAGOR AND MORTGAGEE. By indenture of mortgage between A. and B., A. released lands to B. in fee, habendum to B. in fee, upon and for the trusts, ends, intents and purposes thereinafter expressed; and by the same indenture, A. demised other lands to B., habendum for ninety-nine years, upon and for the trusts, &c., thereinafter expressed: provided, that if A. should pay B. 550*l.* with interest, on the 5th of October then next, the indenture should be void; but if A. should not then pay, it should be lawful for B., after giving one month's notice as therein mentioned, to enter into possession of all the lands, and, whether in or out of possession, to make leases thereof, and also to sell them: and it was declared that B. should stand possessed of the rents and profits of those hereditaments, and the proceeds of the sale in trust, after deducting expenses, to retain the 550*l.* and interest, and afterwards in trust for A.: and B. covenanted not to sell or lease till he should have given A. a month's notice in writing, demanding the principal and interest due at the end of that time, and A. should have made default in payment at that time; and that B. should, at any time before such sale, on payment by A. of the 550*l.* interest and expenses, reconvey and reassign to A., A. covenanted to pay principal and interest. It was also provided and declared, that the freehold lands should be considered the fund primarily liable for the payment of principal and interest, without prejudice to B.'s right to resort to the leasehold lands. A. having remained in possession until after the 5th of October, held that ejectment, both for the freehold and leasehold lands, might be maintained against him by B., without notice. (*Shep. Touch. 272; Cro. Jac. 172, 659; 8 M. & W. 559.*) *Doe d. Pursley v. Day*, 2 Q. B. 147.

2. Declaration in covenant stated, that by an indenture of assignment of certain leasehold premises, between the plaintiff, the defendant's testator, and W., the testator, for himself, his executors, &c., covenanted with the plaintiff to pay to W. the sum of 1200*l.*, and interest. By the indenture as set out in the plea on

oyer, it appeared that the plaintiff had mortgaged the premises to W., with a proviso that if the plaintiff, his executors, &c., *six months after demand* in writing, should pay the 1200*l.* to W., W. would reconvey: that the assignment by the plaintiff to the testator was subject to the above indenture of mortgage to W., and to the payment to him of the said sum of 1200*l.* There was then a general covenant for payment by the testator to W. of the said sum of 1200*l.* The plea then alleged, that no demand in writing of payment of the sum of 1200*l.* was made upon the plaintiff:

Held, on demurrer to the plea, that the declaration was bad, since, as no demand of payment had been made by W. on the plaintiff pursuant to the proviso, the money was not due, and the defendant was not liable on his covenant. *Trott v. Smith*, 10 M. & W. 453.

NEGLIGENCE. (*In driving, when actionable.*) The general rule of law respecting negligence is, that although there may have been negligence on the part of the plaintiff, yet unless he might by the exercise of ordinary care have avoided the consequences of the defendant's negligence, he is entitled to recover. Therefore, where the defendant negligently drove his horses and wagon against and killed an ass, which had been left in the highway fettered in the fore-feet, and thus unable to get out of the way of the defendant's wagon, which was going at a smartish pace along the road, it was held, that the jury were properly directed, that although it was an illegal act on the part of the plaintiff so to put the animal on the highway, the plaintiff was entitled to recover. *Davies v. Mann*, 10 M. & W. 546.

NUISANCE. (*Case against proprietor of drains for—Pleading.*)

In case for a nuisance, occasioned by drains on the premises belonging to the defendant, and adjoining the premises of the plaintiff, the declaration alleged that the defendant was the owner and proprietor of the drains, and that he ought to have kept them cleansed, and have prevented the accumulation of filth from running into the dwelling-house of the plaintiff, but neglected to do so, whereby, &c.: Held, after pleading over, that the declaration was bad, as it did not show that the defendant was the occupier of the drains, and the nuisance was not shown to be of a permanent or continuing character. (Cro. Jac. 555; 4 T. R. 318; 6 B. & Cr. 337.) *Russell v. Shenton*, 2 G. & D. 573.

PARTICULARS OF DEMAND. Declaration in assumpsit contained three counts; the first, on a promissory note for 50*l.*; the second, on another note to the like amount; and the third for 100*l.* on an account stated. The particulars of demand were as follows: "This action is brought to recover the sum of 50*l.*, being the amount of the promissory note in the first count of the declaration mentioned, and also the further sum of 50*l.*, the amount of the promissory note in the second count mentioned. Above are the particulars of the plaintiff's demand, for the recovery whereof he will avail himself of the whole or any part of the declaration." No evidence of the promissory notes was given at the trial, but a conversation with the defendant was proved, in which he acknowledged he owed the plaintiff 100*l.*: Held, that the particulars were insufficient to enable the plaintiff to recover, and that, in order to do so, he was bound to prove an admission or an account stated with reference to the promissory notes. *Roberts v. Elsworth*, 10 M. & W. 653; 2 D. P. C. (N. S.) 456.

2. The first count of a declaration in assumpsit alleged, that the plaintiff was employed by the defendants as a carman, at wages after the rate of 160*l.* a year, and claimed damages for his discharge without just cause during the year; there was also a count for work and labour. The particulars of demand stated, that the plaintiff, besides seeking to recover damages under the special count, also sought to recover under the indebitatus count, 37*l.*, the balance of account for a quarter's work done by him for the defendants, commencing on the 30th June, and ending on the 30th September, 1842, after giving credit for 3*l.* paid on account thereof. It appeared in evidence that the plaintiff was discharged on the 30th July, 1842, for misconduct, which the jury found to be a sufficient cause for his dismissal; that he worked out that day, and that on the next morning the defendant sent for him, and he remained working there that day also, and then left. The jury found that the value of those two days' work was 40*s.*, but that he was entitled to a month's wages, and he accordingly had a verdict for 10*l.* 6*s.* 8*d.*, allowing for the 3*l.*, which had been paid in advance: Held, that the plaintiff was not precluded by his particulars from recovering this sum. *Hurcum v. Stericker*, 10 M. & W. 553; 2 D. P. C. (N. S.) 524.

PARTNERSHIP. A., B., and C. verbally agreed that they should bring out and be jointly interested in a periodical publication. A. was to be the publisher, and to make and receive general payments, B. to be the editor, and C. the printer; and after payment of all expenses, they were to share the profits of the work equally. C. was to furnish the paper, and charge it to the account at cost prices. No profits were ever made, nor any accounts settled. The plaintiff furnished paper to C., for the purpose of being used by him in printing the periodical: Held, that A. and B. were not jointly liable with C. for the price of it. *Wilson v. Whitehead*, 10 M. & W. 503.

PATENT. (*Notice of objections to, when sufficiently specific.*) To a declaration for the infringement of a patent, the defendant pleaded, that the nature of the invention and the manner in which it was performed were not particularly described in the specification; and also, that the invention was not new: and the objections delivered with the pleas under 5 & 6 Will. 4, c. 83, s. 5, stated, first, that the specification did not sufficiently describe the nature of the invention and the manner in which it was to be performed; and secondly, that the invention was not new, and had been wholly or in part used and made public before the obtaining of the letters patent: Held, that the first of these objections was sufficient, but that the second was bad, and ought to have pointed out what portions of the alleged invention were previously in use. (4 Bing. N. C. 127; 6 Scott, 587; 8 M. & W. 822.) *Heath v. Unwin*, 10 M. & W. 684; 2 D. P. C. (N. S.) 482.

PERJURY. (*Indictment—Evidence.*) On the trial of an indictment for perjury alleged to have been committed before magistrates on the hearing of an information for an offence punishable by summary conviction, the conviction is not receivable in evidence, because it is irrelevant.

It is not sufficient to allege in such indictment that before A. and B., two of the justices, &c., C. came and “exhibited a certain information upon oath,” for it does not sufficiently appear thereby that C. was sworn before A. and B.

An averment in an indictment for perjury that “it became and was material to ascertain the truth of the matter hereinafter alleged to have been sworn to and stated by the said I. O. upon his oath,”

is not a good averment of materiality. *Reg. v. Goodfellow*, 1 Carr. & M. 569.

2. Upon an indictment for perjury in an affidavit in which the defendant swore that he had paid all the debts proved under his bankruptcy, one of the assignments of perjury was that he had not paid all the debts proved under his bankruptcy; and another that certain creditors (naming them) were not paid in full: Held, that in order to sustain this indictment the nonpayment of *each* of the debts must be proved by two witnesses. *Reg. v. Parker*, 1 Carr. & M. 639.
3. (*Indictment—Materiality.*) In an indictment for perjury before commissioners of taxes, on an appeal of H. against a surcharge for a greyhound used by H. on the 24th of November, it was averred to be a material question whether a receipt for the price of the greyhound was given to the defendant before the 12th of September. When before the commissioners the defendant swore he bought the greyhound of H. on the 6th of September, and had a receipt for the price before the 12th. ~~An~~ objection that the *sale* of the dog was the only material fact, that the receipt was an immaterial fact, and the 12th of September therefore an immaterial day: Held, that the *receipt* was also material, and that it was properly laid to be a material question whether it was given on the 12th of September.

Every question on cross-examination of a witness which goes to his credit, is material. *Reg. v. Overton*, 1 Carr. & M. 655.

PLEADING. (*Replication of never indebted to plea of set-off.*)

Under a replication that the plaintiff "*never* was indebted in manner and form" as alleged in a plea of set-off, evidence of payment is inadmissible. *Stockbridge v. Sussams*, 2 G. & D. 591.

2. (*Demurrer—Delivery of papers, books—Replication de injuriâ.*) On the argument of a demurrer to a replication the plaintiff may avail himself of any defect in the plea that would be open to him on general demurrer, where he has given notice generally that he means to insist that "the plea is bad in substance and affords no answer to the action." *Semble*, that it is enough to deliver such notice to the judges, and that in strictness the party is not bound to deliver it to his adversary.

To assumpsit on certain bills of exchange alleged in the decla-

ration to have been drawn by the plaintiffs and directed to the defendant under the name and style and title of the Talacre Coal and Iron Company, and accepted by the defendant by one W. W.; the defendant pleaded that certain persons agreed to form themselves into a company, to act as a corporate body, having shares transferable without restriction, not being sanctioned by any charter or act of parliament, and that the persons so associated did act as a corporate body, and did pretend to transfer shares, and that the project was an attempt tending to, the common grievance, prejudice, and inconvenience of great numbers of the subjects of her majesty in their trades and other lawful pursuits. The plea then went on to allege that certain bills of exchange accepted by the company came by endorsement to the hands of the plaintiffs; that it was afterwards agreed between the company and the plaintiffs that the bills (which were then due) should be renewed, whereupon the company (the defendant then being a member thereof and shareholder therein) accepted the bills declared on and delivered them to the plaintiffs in lieu of and in satisfaction for the first mentioned bills, and upon no other account and for no other consideration whatsoever; and that the plaintiffs before and at the time of their becoming endorsees and holders of the bills, and of the making of the agreement with them thereinbefore mentioned, and of the acceptance of the bills, and before they ever gave any value or consideration for the bills, had notice and knowledge of the premises and matters in the plea mentioned. Verification: Held, on special demurrer, that the plea amounted only to matter of excuse for the nonpayment of the bills, and therefore the whole might be put in issue by the general replication *de injuriâ*. (1 M. & W. 65; 7 M. & W. 370.) *Scott v. Chappelow*, 5 Scott, N. R. 148.

3. (*Traverse, when too large*.) Assumpsit by the endorsee against the acceptor of a bill of exchange. Plea, that being indebted to J. M., he the defendant accepted the bill and delivered it to the drawer for a special purpose, viz. that it might be discounted by him, and the proceeds paid to J. M. in satisfaction of the debt: the plea then averred that the drawer held the bill for such special purpose, and for the sole use and benefit of the defendant. Replication, that the drawer did not hold the bill for the said special

purpose, and for the sole use and benefit of the defendant: Held, that the traverse was not too large, as it did not compel the defendant to prove more than he would otherwise be bound to prove in support of his plea. *Eden v. Twile*, 10 M. & W. 635; 2 D. P. C. (N. S.) 459.

4. (*Argumentative traverse.*) Assumpsit on a promise by the defendants to pay 250*l.* on the plaintiff delivering up certain goods, to wit, 2000 hats, on which he had a lien, and the declaration alleged that the plaintiff was ready and willing, and tendered and offered to deliver up the hats, and to abandon his lien, but that the defendants refused to accept them. Plea, that the tender was of two closed casks, which the plaintiff represented contained the said hats, which was the readiness and willingness in the declaration mentioned; but that the defendants did not then, or at any other time, know, nor could they ascertain, the contents of the said casks, or whether the same contained the said hats, nor had they any opportunity of inspecting the contents of the said casks; and although the plaintiff was requested by them to open the casks and allow them to examine the contents thereof, and although the plaintiff had notice that they were willing to accept the hats and to pay the money, yet the plaintiff refused to permit the casks to be opened or to allow them any inspection of the contents thereof: Held, on special demurrer, that the plea was bad, as being an argumentative denial of the tender. *Isherwood v. Whitmore*, 10 M. & W. 757; 2 D. P. C. (N. S.) 549.

5. (*Replication to plea of set-off—Demurrer, effect of its being too large.*) To a plea of set-off, the plaintiff replied, that except as to 97*l.* 12*s.* 4*d.*, parcel &c., he was not at the commencement of the suit, and at the time of plea pleaded, indebted modo et forma, and as to 97*l.* 12*s.* 4*d.*, parcel, &c., that before the pleading of the replication, the plaintiff had paid that sum into court in a cross action brought against him by the defendant, which sum the defendant took out of court in full satisfaction &c., and entered a nol. pros. to the rest of the declaration; concluding with a verification: Held, on special demurrer, that the replication was bad.

Semble, that where there is a demurrer to two counts, or two pleas, one of which is bad and the other good, the court ought to give judgment on the whole record, according to the truth, and

not to overrule the demurrer as being too large. *Briscoe v. Hill*, 10 M. & W. 735; 2 D. P. C. (N. S.) 556.

6. (*Repugnancy on record, when error.*) Assumpsit on an agreement to build a house according to certain drawings, plans and specifications, and to the satisfaction of the plaintiff, &c. The defendant pleaded, 1st, non-assumpsit; 2d, that he did the works to the satisfaction of the plaintiff; 3d, that before the breach the contract was rescinded; 4th, leave and license; and also other pleas alleging deviations from the contract by agreement with and command of the plaintiff. Issues having been joined and taken on those pleas, the cause was at the assizes referred to an arbitrator, who awarded a general verdict to be entered for the defendant. The verdict and judgment thereon having been entered accordingly: Held, that the record was not repugnant, so as to afford ground of error. *Cooper v. Langdon*, 10 M. & W. 785.
7. (*Evidence admissible under plea of payment into court.*) In assumpsit by drawer against acceptor of two bills of exchange for 20*l.* each, the defendant pleaded payment into court of 20*l.* and no damages ultra; the plaintiff replied damages ultra, on which issue was joined: Held, that the plea was bad: but that inasmuch as the plaintiff had joined issue on it, evidence was admissible upon that issue, that the second bill had been given as a renewal of the first, and that the first had been paid by a third party, for whose accommodation it was accepted. (3 Bing. N. C. 824.) *Harris v. Bushell*, 2 D. P. C. (N. S.) 515.
8. (*Plea of release pleaded puis darrein continuance, how proved—Replication of non est factum.*) In an action for goods sold, a witness for the plaintiff having been objected to as being a co-contractor with the defendants, the plaintiffs executed a release to him, whereupon the defendants pleaded the release puis darrein continuance. The witness subsequently cancelled the release by tearing off the seal; the plaintiffs then replied non est factum, to which the defendants rejoined, "that the said deed is the deed of the plaintiff." *Semble*, that this issue was proved by the production of the cancelled deed. *Todd v. Emly*, 2 D. P. C. (N. S.) 570.
9. (*Plea of payment—New assignment.*) Debt for 19*l.* 18*s.* 6*d.*, interest due on a promissory note. Pleas, as to all except 7*l.* 9*s.*

payment; as to that sum payment into court. The particulars of demand claimed 19*l.* 18*s.* 6*d.* At the trial it was proved that the whole sum which had accrued due for interest on the note since it became payable was 75*l.*; the defendant proved payment of 62*l.*; the jury, deducting the 7*l.* 9*s.* paid into court from the residue, 13*l.*, gave a verdict for the plaintiff for 5*l.* 11*s.*: Held, that the verdict was right, and that the plaintiff was not bound to new assign that he brought the action for a sum beyond that already paid. (5 Bing. N. C. 553.) *Kenningham v. Alison*, 2 D. P. C. (N. S.) 658.

PRACTICE IN CRIMINAL CASES. (*Discharging jury.*) The jury in a criminal case cannot be discharged after they have been sworn, on its being discovered that a relative of the prisoner is upon the jury. *Reg. v. Wardle*, 1 Carr. & M. 647.

RELEASE. (*Of bygone rent.*) In replevin, the defendant made cognizance for half a year's rent due at Michaelmas, 1841, for a farm held by the plaintiff under J. H. at a rent of 86*l.*, payable half-yearly at Lady-day and Michaelmas; the plaintiff pleaded in bar, that by an indenture made between J. H. and the plaintiff, purporting to be made on the 1st of February, 1841, but which was in fact made after Michaelmas, 1841, and after the rent became due, J. H. released the plaintiff from the rent. The replication set out the indenture, which bore date 1st February, 1841, and was a lease from J. H. to the plaintiff of the farm, to hold from 30th July, 1840, for fourteen years, at a rent of 86*l.* payable half-yearly at Lady-day and Michaelmas, the first payment to be made at Lady-day *next*: Held, that this was no release of the rent for which the cognizance was made. *Cooper v. Robinson*, 10 M. & W. 694.

REPLEVIN. (*Cognizance for double rent, form of.*) In a cognizance by defendant as bailiff, for *double rent*, under the 11 Geo. 2, c. 19, s. 18, the terms of the tenancy, and of the notice to quit, should be so shown, that the tenant's power to determine the tenancy by notice to his landlord for that purpose, and the sufficiency, in law, of the notice actually given, may appear. It is not sufficient (on *special demurrer*) to allege that the tenant, "*having power to determine by such a notice as hereinafter mentioned,*"

gave a notice to quit on a given day passed. *Humberstone v. Dubois*, 10 M. & W. 765; 2 D. P. C. (N. S.) 506.

SHERIFF. (*Jurisdiction of the courts over.*) The court has a jurisdiction over a sheriff in respect of writs executed by him, although his office has since been abolished by the act of parliament. *Warner v. Powell*, 2 D. P. C. (N. S.) 531.

2. (*Action for false return of nulla bona—Evidence to prove fraud in prior executions, how far admissible.*) In an action against a sheriff for a false return of nulla bona, to which the defence is that prior writs are in the hands of the sheriff to an amount sufficient to cover the whole of the defendant's goods, the plaintiff may give evidence to show that the judgments and prior executions were fraudulent and void, without proving that the sheriff was a party to or had notice of the fraud; and for that purpose the conduct of the debtor with respect to such prior executions is admissible.

Where a sheriff has seised goods under a writ issued upon a judgment, which is fraudulent against creditors under the 13 Eliz. c. 5, and such goods remain in his hands, he is bound to seise and sell them under a subsequent writ, founded upon a bona fide debt. (5 B. & C. 660; 8 B. & C. 132; 1 Ves. sen. 239; Peake's N. P. C. 85.) *Imray v. Magnay*, 2 D. P. C. (N. S.) 531.

SLANDER. (*Pleadings—Proof of introductory averments.*) Slander.—The declaration, after reciting that A. and B., the plaintiffs, were lawful husband and wife, and that B. was the lawful sister of one C., alleged that the defendant spoke of and concerning the plaintiff B. and her intermarriage, and of and concerning C., the false, &c. words following: "It has been ascertained beyond doubt that C. and B. are not only not brother and sister, but man and wife:" Held, first, that the plaintiffs were not bound to prove the introductory averment that B. was the lawful sister of C.; secondly, that the declaration was not bad in arrest of judgment. *Heming v. Power*, 10 M. & W. 564.

2. (*Pleadings.*) Declaration for words alleged that plaintiff, an apothecary, having attended the defendant's child, which was ill, with the defendant's consent, made up and administered certain medicines to the child, and amongst others a saline injection; and that, the child having died of such sickness, the defendant pub-

lished of and concerning the plaintiff these words: "he killed my child, it was the saline injection that did it;" innuendo, that the defendant meant that the plaintiff had been guilty of feloniously killing the child. The defendant pleaded a justification, for that the plaintiff did "injudiciously, indiscreetly, and improperly, and contrary to his duty in that behalf," administer a certain saline injection to the child, and that its death was occasioned or greatly accelerated by the said injection: Held, on demurrer, first, that the count substantially alleged a criminal offence to have been imputed to the plaintiff; secondly, that the plea was bad, for that it confessed the meaning so imputed to the words spoken, viz. that the plaintiff had been guilty of manslaughter, but contained no justification for such a charge.

The second count of the declaration alleged the use of these words: "He made up the medicines wrong, through jealousy, because I would not allow him his own judgment;" innuendo, that the plaintiff had intentionally, and from jealousy and improper motives, made up the medicines in a wrong and improper manner, and that such medicines were, to his knowledge, unfit and improper: Held, that the words, as alleged, imputed no criminal offence, and that the count was therefore bad.

The third count alleged the use of these words: "Mr. P. told me that he had given my child too much mercury, and poisoned it, otherwise it would have got well;" innuendo, that the plaintiff had, through ignorance or inattention, administered to the child such an excessive quantity of mercury, that it had acted as poison, and caused the child's death. Plea, that the plaintiff did "wrongfully and improperly, and contrary to his duty," administer to the said child an excessive proportion of mercury, having reference to the state and condition of the child: Held, that this plea was also bad, for that it did not confess or avoid the charge contained in the count. *Edsall v. Russell*, 2 D. P. C. (N. S.) 641.

TENDER. (*When conditional.*) In debt, where the plaintiff claimed 42*l.*, the defendant pleaded payment, set-off, and tender; and having shown payments to the extent of 29*l.* called a witness, who said that he went to the plaintiff and said, "I offer you 7*l.* 16*s.* 8*d.* as the balance of 35*l.*, and request a receipt in full:" Held, a conditional, and therefore an insufficient tender. (Peake's

N. P. C. 179; 8 C. & P. 752; 8 M. & W. 298.) *Feord v. Noll*, 2 D. P. C. (N. S.) 617.

TRESPASS. (*Particulars, when granted in.*) The court will not grant particulars in an action of trespass, on the mere affidavit of the defendant that he had read the declaration, and that from the general and vague form thereof he was unable to ascertain the grievances on which the plaintiff intended to rely; but some special ground must be shown as a reason for granting the rule. *Horlock v. Lediard*, 10 M. & W. 677.

2. (*Trespass or case—Evidence—Pleading—Estoppel.*) Trespass for breaking and entering the plaintiff's house. The defendants, F. and M., justified the trespasses, the former as owner of the fee, the latter as his servant; M. also pleaded not guilty. The plaintiff entered a nol. pros. as to F., but replied an estoppel as to M., alleging that, before the trespasses, M. demised the premises to the plaintiff as a yearly tenant, which demise was still in force and undetermined. Rejoinder, traversing that the tenancy was still in force and undetermined, &c. At the trial, the demise from M. to the plaintiff was proved, and it was shown that a notice to quit, signed by F. and M. was served on the plaintiff, and that subsequently a complaint was made to two magistrates, under the stat. 1 & 2 Vict. c. 74, s. 1, which was signed by F., "as for himself and M.; either or both of them;" that upon such complaint a warrant was issued, which contained the name of only one complainant, under which the trespass in question was committed, and the plaintiff was ejected, the key of the house being taken by the officer to the defendant M. The jury having found for the plaintiff: Held, that that verdict was warranted by the evidence, and that there was no ground for a nonsuit.

Held also, first, that trespass, and not case, was the proper remedy; secondly, that the authority of the defendant M. as the servant of F., was sufficiently denied by the replication of estoppel. *Darlington v. Pritchard*, 2 D. P. C. (N. S.) 664.

3. (*Pleading—Issue on right of way.*) Trespass for breaking and entering the plaintiff's close, (which was set out by abutments), and pulling down certain posts and bars standing thereon. Plea, that there was a public footway over the close, and that the defendants, because the posts and bars obstructed the way, pulled them down.

Replication, traversing the footway : Held, that on these pleadings the defendants were entitled to a verdict, on a proof of a right of footway in *any direction* over the close, and were not bound to prove a way over the place where the post and bars stood. *Webber v. Sparkes*, 10 M. & W. 485.

TROVER. (*Giving colour in—Pleading—Duplicity.*) Trover for two receipts. Plea, that before and at the time when, &c. the defendants were lawfully possessed as of their own property of the same receipts, and that being so possessed, the defendants afterwards and before the said time when, &c., delivered the same to one J. D., to be kept by him to and for the use of the defendants, and that J. D. afterwards and before the said time when, &c., delivered the same to the plaintiff; and that afterwards and before the said time when, &c., the plaintiff casually lost the same out of his possession, and the same by finding came to the possession of the defendants; and that the defendants afterwards refused, upon the request of the plaintiff, to deliver the same to the plaintiff, as they lawfully might for the cause aforesaid, which is the same conversion of which the plaintiff has complained: Held, that the plea was bad for duplicity, and for not confessing a conversion. *Acraman v. Cooper*, 10 M. & W. 585; 2 D. P. C. (N. S.) 495.

WARRANT OF ATTORNEY. (*Judgment on old warrant of attorney—Affidavit.*) The affidavit in support of a motion for judgment on an old warrant of attorney must state positively that the deponent has seen the defendant *alive* at a recent period. (4 D. P. C. 629.) *Watson v. Matthews*, 2 D. P. C. (N. S.) 670.

WITNESS. (*Competency.*) S., being in insolvent circumstances, assigned his effects to the defendant in trust to sell, and distribute the proceeds rateably among his creditors, of whom the plaintiff was one. The sale realized 2s. 6d. in the pound on the amount of the debts, and the defendant promised the plaintiff to pay him his proportion: Held, in an action for money had and received, brought by the plaintiff against the defendant to recover such proportion, that S. was a competent witness for the plaintiff. *Hawley v. Cadbury*, 10 M. & W. 505; 2 D. P. C. (N. S.) 505.

2. (*Copyholder, competency of.*) Copyhold tenants, having a commonable right over the waste of a manor, are not competent wit-

nesses for the lord of a manor, lessor of the plaintiff in an ejectment, in which the contention is whether the land in dispute is parcel of the waste of the manor. (11 Ad. & E. 786; 1 B. & Adol. 439.) *Doe d. Pye v. Branwhite*, 2 G. & D. 654.

3. (*Examination of, abroad.*) Where the defendant in an action on a marine policy applied for an order for the examination of witnesses in New Zealand, and it was not imputed that he made the application for the sake of delay, the court refused to impose a condition that he should pay the money into court, and also undertake to pay interest from the time of action brought, in the event of plaintiff obtaining judgment. *Birnie v. Janson*, 2 G. & D. 630.

EQUITY.

[Selections from 4 Mylne & Craig, Part 4; 11 Simons, Part 4; 2 Younge and Collyer, Part 1; and 2 Hare, Parts 1 and 2.]

ADMINISTRATION OF ASSETS. (*Bankrupt's executor.*) In an administration or creditors' suit against an executor becoming bankrupt or insolvent, and who is, at the same time, indebted to the estate of his testator, the costs of the executor incurred before his bankruptcy or insolvency will be set off against his debt; and the costs of the same executor, properly incurred after his bankruptcy or insolvency, will be allowed out of the estate. *Samuel v. Jones*, 2 H. 246.

2. (*Creditors' suit.*) Inquiries will not be directed in a creditor's suit, as to whether certain and proposed dealings with the property of the testator are beneficial or not to the estate. *Collinson v. Ballard*, 2 H. 119.
3. (*Foreign legatee—Duty of inquiring into foreign law.*) A testator who died, and whose will was proved in England, bequeathed a legacy to a married woman, whose domicile, as well as that of her husband, was in Scotland. The husband died a few months after the testator, without having received the legacy. After his decease the executors of the testator, with knowledge of the before-mentioned facts as to domicile, paid the legacy to the widow, which according to the Scotch law should have been paid to the husband's personal representatives: Held, that in the absence

of proof that the executors knew the Scotch law on the subject, the payment to the widow was a good payment. *Leslie v. Baillie*, 2 Y. & C. 91.

4. (*Future debt.*) A creditor whose debt consisted in bills payable at future times, with a bond for the whole amount, in case default should be made in payment of any of the bills, held entitled to maintain a creditor's suit, there being no admission of assets—but no mismanagement being proved against the personal representative, the court declined at the hearing to appoint a receiver or give the plaintiff security for his debt. *Whitmore v. Osborn*, 2 Y. & C. 13.
 5. (*Payment pending suit.*) Order for payment of the dividends of a fund in court to the executors, for distribution amongst the parties interested, before the accounts of the estate were taken, the executors admitting assets of the testator for all purposes. *Shewell v. Shewell*, 2 H. 154.
 6. (*Proof of plaintiff's debt.*) Under a decree in a suit by a bond creditor, made on proof of the debt, the executors may, in the master's office, impeach the validity of the plaintiff's debt upon grounds which were not in issue in the cause at the hearing. *Whittaker v. Wright*, 2 H. 310. (But see *infra*, *Woodgate v. Field*.)
 7. (*Same—Mode of proof.*) The nature of the evidence that may be required in the master's office in proof of debts, particularly of bond debts, considered, with reference particularly to the late case of *Rundell v. Lord Rivers*, Turn. & Phill. 88. (L. M. No. 60.) S. C.
 8. (*Same—Immediate decree.*) If in a suit by a creditor on behalf of himself and all other creditors, the debt is either admitted or proved in the cause before the hearing, and assets are admitted, the plaintiff is entitled to a decree for immediate payment; and it was so held in a case where the executor by his answer suggested that the claim was founded on forgery, and alleged at the hearing that he had ignorantly supposed that he might contest the debt before the master, and therefore did not go into evidence. *Woodgate v. Field*, 2 H. 211. (But see *supra*, *Whittaker v. Martin*.)
- ANNUITY. (*Insufficiency of rents and profits.*) The court refused to order an estate charged by a will with an annuity, to be either

mortgaged or sold for payment of the annuity, notwithstanding the rents were very inadequate to pay it, and it had become greatly in arrear; the estate being settled on A. for life, with remainders over; the annuitants being still alive, and there being no necessity for the court to direct the estate to be either sold or mortgaged for payment of the testator's debts. *Graves v. Hicks*, 11 S. 551.

BANKING COMPANY. (*Liability after mistaken payment.*) A banking company having in acknowledgment of moneys deposited by A. given him receipts transferable by endorsement, and such receipts having been fraudulently endorsed by a relative of A. having the same christian name and surname, and so paid by the bank: Held, that the bank was liable to pay them over again, and that the representatives of A. being obliged to come into equity for a discovery, and also for delivery up of the receipts, might obtain a decree for payment also. *Pearce v. Creswick*, 2 H. 286.

CHARITY. (*Informal appointment of trustees.*) By a deed of trust of 1682, for the appointment of a vicar, by election of the inhabitants of a parish, it was declared, that, upon the death of any of the trustees, the survivors should from time to time, when and as often as they should think fit, before the number of trustees should be reduced to the number of five, or within three months after they should be reduced to the number of four, appoint new trustees, and convey the premises to them, so as to complete the number of nine trustees. It appeared that, from the date of the deed to the election of a clerk in 1940, this clause had never been strictly acted upon, though the number of the trustees had generally been kept up to nine: Held, that the informality in the appointment of the trustees did not vitiate the election. *Attorney General v. Cuming*, 2 Y. & C. 139.

2. (*Religious foundation—Appointment of trustees.*) The vice-chancellor having decided (see 7 S. p. 309.), which judgment was afterwards affirmed on appeal by the lord chancellor and the House of Lords, that neither Unitarians nor members of the Established church were entitled to the benefit of the charity, but without saying who were, afterwards upon a contest between the different parties, ratified the appointment of trustees made by the master in the following proportions: three from the Independents, two from the Presbyterians in connexion with the Established

Church of Scotland, and two from the Presbyterians in connexion with the Secession Church of Scotland. *Attorney-General v. Shore*, 11 S. 592.

CHOSE IN ACTION. (*Equitable assignment—Order and disposition.*) An engagement to pay out of a particular fund will amount to an equitable assignment of that fund without any assent to the transfer by the holder of the fund. Accordingly where A. being indebted to B., and having goods in the hands of C., promised to transfer those goods into the hands of B.'s agent, and wrote to C. accordingly, but before the letter was received by C., A. committed an act of bankruptcy, on which a fiat was issued; it was held (affirming the decision of the vice-chancellor of England in a suit against A.'s assignees to restrain them from taking out judgment in an action of trover brought by them against B., who had received the goods) that there was a valid assignment in equity. *Burn v. Carvalho*, 4 M. & C. 690.

2. (Shares in a Company—Trust—Assignment—Bankruptcy).

Trust funds were vested in the purchase of transferable shares in a banking company, in the name of one of the trustees, who executed a declaration of the trusts thereof, (the rules of the company not allowing shares to stand in the name of joint owners or cestui que trusts). The trustee was also a proprietor of shares in his own right in the same company, and made various sales and purchases of shares therein. There was nothing to distinguish which were the individual shares held by the different proprietors, the same being in the nature of capital expressed by quantity. The trustee contracted to assign a certain number of shares to the banking company as a security for advances which they made to him; he afterwards became bankrupt: Held, that the trustee must be presumed to have transferred or pledged such shares as belonged to himself, and, so far as he had shares of his own, not to have transferred or pledged the shares of his cestui que trusts.

That, therefore, the cestui que trusts were entitled to so many of the shares standing in the name of the trustee at the time of his bankruptcy, as could be presumed to be identical with the shares in which the trust funds were invested, from the fact that such a number of shares had always thenceforward stood in the name of the trustee. *Pinkett v. Wright*, 2 H. 120.

CONVERSION. (*Discretionary power to sell.*) Real estate was conveyed to a trustee, on trust to permit a mortgagor to receive the rents and profits, and upon payment of the principal and interest of the mortgage debt as therein mentioned, to reconvey the estate to the mortgagor, his heirs and assigns, but if default should be made in such payment, then that the trustee should enter into possession of the premises, and, at his discretion, sell the same, and pay over the residue or surplus (after payment of the debt, interest, and costs), to the mortgagor, his heirs, executors, administrators, or assigns. There was default in payment, but no sale of the estate took place until after the death of the mortgagor, who devised it to the plaintiffs for life, with remainder over in tail: Held, that there was no conversion, but that the surplus proceeds passed by the devise as real estate. *Bourne v. Bourne*, 2 H. 35.

COPYRIGHT. (*Partial copyright—Purchase of edition.*) By an agreement between an author (sir E. Sugden) and a bookseller, it was agreed that Messrs. H. (printers) should print 2500 copies of the work in type and page corresponding with another of the author's works, at the sole cost of the bookseller, and that the latter should pay to the former for the said edition a certain sum by instalments; the work to be divided into three volumes, and sold at a fixed price.

Held, that the bookseller was not merely a purchaser of 2500 copies of the work, but was in equity an assignee of the copyright of it, to the extent that he was to be the sole publisher of it until the whole edition should be sold, and might maintain a bill by him to restrain a piracy of the work: Held also, that, notwithstanding some of the passages alleged to have been pirated were contained in the prior editions as well as the new edition of the work, the plaintiff was entitled to rely upon them, in aid of his title to the relief prayed.—The injunction having been granted on the plaintiff's undertaking to try his right at law, and the author declining to allow the plaintiff to bring the action in his name, the defendant was ordered to admit at the trial that the plaintiff was the legal proprietor of the pirated work. *Sweet v. Cater*, 11 Sim. 572.

2. (*Rival Works—Disparaging advertisements.*) Where there are two rival works, the court will restrain the proprietor of one of them from advertising it in terms calculated to induce the public

to believe that it is the other work, but will not restrain him from publishing an advertisement tending to disparage that other work. *Seeley v. Fisher*, 11 S. 581.

DISCLAIMER. (*Costs.*) A party having an interest in the subject-matter of a suit by virtue of a partnership, but having parted with his interest prior to the date of filing the bill was made a defendant, and by his answer disclaimed. The plaintiff was ordered to pay such defendant's costs, without being entitled to them over, the court being of opinion that the plaintiff might have easily ascertained the fact of the assignment, and it not appearing that he had attempted to do so. *Teed v. Carruthers*, 2 Y. & C. 31.

DISCOVERY. (*Duty of defendant to inquire.*) In answer to a bill seeking to impeach a security and requiring the defendant to set forth what communications passed between his solicitor and agents in the transaction and the plaintiff, and what letters were written and received, and entries made on the subject by such solicitors, it is not sufficient for the defendant to say, that the solicitors had ceased for several years since the transaction to be his solicitors or agents, and that he does not know what communications or entries they had or made; but the defendant must show that he has endeavoured to acquire the information asked for. *Earl of Glengall v. Fraser*, 2. H. 99.

DOWER. (*Election.*) An annuity charged on all testator's real estate, and the devise of a house during widowhood, held to be no bar to dower; but the question was reserved, whether in the event of the widow marrying again she would be entitled to dower out of the house. *Holdich v. Holdich*, 2 Y. & C. 18.

EXECUTORY TRUST. (*Settlement by the court—Protector of settlement.*) Where it was referred to the master to draw up a settlement in pursuance of a direction in a deed executed by the late lord Despencer, that his estates should so far as the law would allow be strictly settled after his death, so as to go along with the title, so long as the holder of the title should be a lineal descendant of himself, but with a provision, that in case the title should at any time, within the limits prescribed by the law for strict settlements, be suspended or in abeyance, then that the rents and profits of the estates should during such interval be equally divided among the coheirs *per stirpes* of the person or persons by

whose death or deaths such abeyance should have been occasioned; the court approved of a settlement in which this latter object was secured by a proviso, subject to be defeated by a recovery, and not as suggested by the court at the first hearing, (10 Sim. 576; L. M. No. 56), by a term of 1000 years prior in limitation to all the other uses; and the court also declined to appoint a protector of the settlement, by reason of his irresponsibility if appointed. *Banks v. Le Despencer*, 12 S. 508.

FRAUD. (*Medical attendant—Fictitious consideration.*) A deed purporting to be a conveyance by way of sale of real estate from an aged and infirm person to his intimate friend and medical attendant, set aside for fraud, the money apparently paid at the execution of the deed having been provided by the grantor for the purpose, and the transaction having been kept secret from the household and family of the grantor. *Gibson v. Russell*, 2 Y. & C. 104.

GUARDIAN. (*Religious education of infant.*) The circumstance that it will be for the pecuniary advantage of the infant to be educated in one faith rather than in another, is no inducement for the court to interfere with the discretion which the guardian has in this matter.

N. B. The case arose as to the private act of 6 Geo. 1, settling the Shrewsbury estates, under which any tenant for life becoming a Protestant will be relieved from the disability to alienate, imposed by the act on the Catholic holders of the property. *Talbot v. Earl of Shrewsbury*, 4 M. & C. 672.

HUSBAND AND WIFE. (*Separation—Equity for a settlement.*) A married woman who had left her husband, and was living separate from him, but not in a state of adultery, held to be entitled to a settlement out of a sum of stock, to which her husband had become entitled in her right. *Eedes v. Eedes*, 11 S. 569.

INFANT. (*Next friend.*) The court will not remove a next friend merely because he is nearly related to or connected with the defendant; but it must see that there is a probability that the infant's interest will be prejudiced, if the next friend is allowed to remain. *Bedwin v. Asprey*, 11 S. 530.

INJUNCTION. (*Doubtful equity—Colonial law.*) A mortgagor of property situate in British Guiana, where the Dutch law prevails,

in pursuance of a subsequent arrangement, gave a note to the mortgagee for payment of an instalment of the mortgage money, upon which note the mortgagee brought an action. The mortgagor then filed a bill, stating that according to the law of the colony, a mortgage was effected by a transaction in court, of which one authentic copy, called a *grosse*, was given to the mortgagee, which carried with it, in whosoever hands it was, the right to the mortgage, that the mortgagee had not produced that *grosse*, and asking for the common injunction until such production, which was granted. On the answer of the mortgagee coming in, which was not very explicit either as to the law or the facts, the court continued the injunction upon the terms of the money being brought into court, and the plaintiffs consenting to an immediate reference as to the law. *Bentinck v. Willinck*, 2 H. 1.

INSOLVENCY. (*Gift over, on attempt to alienate.*) Where an annuity was bequeathed by will, with a declaration that the legatee should have no power to sell, mortgage, encumber or anticipate it, and that in case he should attempt to do so, the fund should be divided among his children, and the legatee presented a petition to be discharged under the 1 & 2 Vict. c. 110: Held, that this was a forfeiture. *Brandon v. Aston*, 2 Y. & C. 24.

2. (*Same—Discretion of trustees.*) A person conveyed property to trustees, upon trust to pay the rents and profits to his son T. for life, provided that in case T. should be declared bankrupt, or be discharged under any insolvent act, the trustees should apply the rents and profits in or towards the maintenance, clothing, lodging, and support of the said T. and his then present or any future wife, and his children, or any of them, or otherwise for his, her, their, or any of their use and benefit, in such manner as the trustees should in their discretion think proper. T. was taken in execution for debt at the suit of a creditor, who obtained a vesting order against him under the stat. 1 & 2 Vict. c. 110, and the insolvent was afterwards discharged under that act. Held, that the life estate of the insolvent was forfeited at the time of his discharge; that from the date of the vesting order to the time of the discharge, the rents and profits of the estate belonged to the assignee under the act; that, upon the discharge taking place, the discretionary power given to the trustees by the settlement might be exercised

by them in favour of the insolvent, his wife and children collectively, or in favour of any of those persons, to the exclusion of the others, and that, to whatever extent the power might be exercised in favour of the insolvent, the benefit which he would take by the appointment would rest in the assignee. *Lord v. Bann*, 2 Y. & C. 98.

JURISDICTION. (*Discovery and relief.*) Where the right to discovery or production of documents, in aid of an action, involves the same question as the right to recover at law, the court will give the relief as well as the discovery. *Pearce v. Cresswick*, 2 H. 286. (See S. C. title **BANKING COMPANY**.)

2. (*Transfer of causes.*) A cause set down before the *vice-chancellor of England*, was ordered to be transferred to another branch of the court. Held, that the *vice-chancellor of England* had, nevertheless, jurisdiction to hear a petition in the cause, presented before the order of transfer was made. *Hills v. Hills*, 11 S. 571.

LEASE. (*Agreement—Specific performance.*) Although an agreement between an intended lessor and lessee may possibly amount at law to a present demise or assignment, yet if upon the face of the instrument it appears that a further instrument is necessary to carry the intention of the parties into execution, a court of equity will treat it as an agreement to be specifically performed in that particular. *Fenner v. Hepburn*, 2 Y. & C. 159.

2. (*Liability of equitable assignee.*) The bill, which was a creditor's bill, stated that A. had been in possession, as equitable tenant for life under a settlement, of a leasehold estate, of which the reversion was in the plaintiff, that A. had paid rent during his life, and had become liable for the covenants in the lease, without saying how, and that his administrator had since his death entered into possession of the leasehold, and had paid rent. The bill asked for payment of dilapidations, out of A.'s estate: Held, on demurrer, that there was no sufficient allegation of debt. *Arkwright v. Colt*, 2 Y. & C. 4.

LEGITIMACY. (*Future illegitimate children of a woman.*) A married woman, having several legitimate children and one illegitimate child, and being separated from her husband, and enciente with a second illegitimate child, appointed a fund to her illegitimate child then born, reserving a power of revocation as to a moiety,

in favour of *any after born children* she might have born of her body. After the birth of a second illegitimate child, she revoked the appointment of the moiety, and appointed the entire fund equally between the two illegitimate children: Held, that the power of revocation being in favour of children generally, could not be exercised in favour of the after-born illegitimate child. *Dover v. Alexander*, 2 H. 275.

LIEN. (*Payment by solicitor.*) The solicitor of the executrix having paid a sum which was due to a third party, who had a lien on the title deeds belonging to the testator's estate for the amount, gave a receipt for the deeds in the name of the executrix, and, as her solicitor, carried into the master's office her examination, in which the sum he had so paid was stated to have been paid by the executrix, and was allowed accordingly: Held, that the solicitor must, in such circumstances, be presumed to have made the payment on the behalf and on the personal security of his client, and that he could not claim a lien upon the deeds for the amount. *Christian v. Field*, 2. H. 177.

MAINTENANCE. (*Allowance to father for past maintenance.*) Testator bequeathed an annuity to his grand-daughter, to be applied whilst she was under age in and towards her maintenance and education, in such manner as his trustees should in their absolute discretion think fit, and whether her father should be able to maintain and provide for her or not. The trustees having made a very small payment on account of the annuity, and having made no provision for the maintenance or education of the infant, who had been wholly provided for by her father, the court declared that, in the event of its appearing that the father had properly maintained and educated the infant from the testator's death, he should receive the whole annuity for the time past and till further notice; he undertaking properly to maintain and educate her, and to abide by the order of the court. *Stephens v. Lawry*, 2 Y. & C. 87.

MORTGAGE. (*Arrears of interest—Collateral security—Statute of Limitations.*) Under the statutes 3 & 4 Will. 4, c. 27, s. 42, and 3 & 4 Will. 4, c. 42, s. 3, a mortgagee of land, whose mortgage debt and interest are secured also by a bond or covenant, is entitled in a foreclosure suit as well as in a redemption suit to

charge the mortgaged estate with the full arrears of interest accruing on the mortgage debt within twenty years before the institution of the suit; but if the debt and interest are secured only by the mortgage, the mortgagee is entitled to no more than six years' arrear of interest. *Du Vigier v. Lee*, 2 H. 326.

2. (*Foreclosure before answer.*) On a motion by a defendant for an immediate decree in a foreclosure suit, under the statute 7 Geo. 2, or under the jurisdiction of the court, independent of the statute, the order may be made without answer; and if the bill suggests that the defendant has parted with the equity of redemption, he will be allowed to give the required discovery as to that fact upon affidavit. *Piggin v. Cheetham*, 2 H. 80.
3. (*Foreclosure—Costs—Pleading.*) The court refused to grant to a mortgagee of leaseholds the costs of citing the next of kin of the mortgagor in the ecclesiastical court, in order to compel him to take out administration, because no case was made for the costs by the bill, and leave was refused to present a petition for the purpose. *Ward v. Barton*, 11 S. 534.
4. (*Redemption by creditor.*) The plaintiff in a creditor's suit, after a decree for sale of the real estate, may sustain a suit for redemption against a mortgagee, or a party entitled to a lien on the title deeds. *Christian v. Field*, 2 H. 177.
5. (*Satisfaction by bills of exchange—Collateral security.*) Where there was a mortgage payable in 1844, with interest only in the meantime, and in 1839 the mortgagor paid the principal by cheque and gave two bills, accepted by himself, but drawn by a third party, for the arrears of interest, and thereupon the following receipt was executed by the mortgagee: "London, 23d December, 1839. Received the sum of 7000*l.* in cash, and two bills of exchange as under for 3120*l.*, drawn by C. & Co. of M., upon and accepted by the said C. the mortgagor, and which cheque for 700*l.* and bills for 3120*l.*, making together 10,120*l.*, are in full of principal and interest due to me upon a mortgage of C.'s freehold property in K. and S. for 10,000*l.*, and I do hereby undertake whenever required, to execute a conveyance of the said property. (Signed,) T." The deeds were delivered up to the mortgagor together with this memorandum, but the estate was not reconveyed. The cheque was paid, but the bills were dishonoured: Held, that

the mortgagee was entitled against the assignees of the bankrupt mortgagor to have the deeds redelivered up, and to have a foreclosure of the estate. *Teed v. Carruthers*, 2 Y. & C. 31.

6. (*Waste by mortgagor.*) The mortgagee in the case of an insufficient security, and whether in a suit simply to foreclose or sell, or in a suit by him in the double capacity of mortgagee and creditor, against the executor of mortgagor, for sale in the first instance, and then for payment of the deficiency out of the general estate, is entitled to an injunction to prevent the felling of timber; but *quære*, what is an insufficient security? *King v. Smith*, 2 H. 239.

PARENT AND CHILD. (*Purchase in son's name.*) One seised of a copyhold for the joint lives of himself and his brother afterwards surrenders it, and takes a new grant for the joint lives of himself, the brother, and one of the surrenderor's sons: Held, that the latter, who survived both his father and uncle, was entitled to the copyhold for his own benefit as an advancement. *Skeats v. Skeats*, 2 Y. & C. 9.

PARTIES. (*Partial administration.*) *Quære*, whether in a suit originally instituted against the heirs and administrators of a purchaser for performance of a contract, which it was alleged by the bill the heir had taken upon himself, the administrator having afterwards died, it is sufficient to bring before the court in his stead an administrator *de bonis non*? *Cave v. Cork*, 2 Y. & C. 130.

PARTNERSHIP. (*Conversion.*) Two brothers, A. and B., entered into copartnership without articles, and purchased lands for the purposes of their trade with money borrowed from C., and had the land conveyed to themselves in moieties to uses to bar dower. Shortly afterwards they mortgaged the land to C. in fee, to secure the money borrowed. A. died intestate, leaving B. his heir; B. then took D. into partnership. Each of the firm erected trade buildings on the land, and paid for them, and for the insurance on them, and also paid the interest on the mortgage money out of their partnership funds. Ultimately B. and D. paid off the mortgage out of their partnership property, and took a reconveyance of the land to themselves as joint-tenants in fee. Previous to this the property had been in a family arrangement, to which B. was a party, treated as personalty: Held, as against the heir of B.,

that it was personalty, as part of the partnership assets. *Houghton v. Houghton*, 11 S. 491.

2. (*Power of one partner to bind the firm.*) The implied authority of a partner to bind his copartners for the repayment of money borrowed for partnership purposes, does not necessarily extend to raising money for the purpose of increasing the fixed capital of the firm; and therefore a party advancing money to one partner, knowing that it was for this purpose, cannot as a matter of course charge the other partners with the loan, unless the transaction took place with their express or actual authority.

Two partners in a firm advertised their intention of adding 16,000*l.* to their capital, by admitting one or more additional partners. W. entered into a negotiation with one of the partners, then acting on behalf of both, on the subject of the announcement, but afterwards declining to enter into the firm, advanced a sum of 4000*l.* to that partner by way of loan, on the security of the bills of the firm, and also of the separate estate of each partner: Held, that W. had, so far as this evidence went, notice that the loan of 4000*l.* was an advance, not within the implied authority of the partner obtaining it, the other partner having authorized the capital to be raised in a different mode; but, inasmuch as the original partnership was then existing, and the advance might have been within the scope of the partnership authority, without reference to the proposed increase of capital, liberty was given to W. for the purpose of trying that question, to bring an action on the bill against the executors of the other partner. *Fisher v. Tayler*, 2 H. 218.

PLEADING. (*Effect of general charge.*) There is no rule of pleading which requires that the facts creating the title of the plaintiff to relief must appear on the stating part of the bill; but an allegation that the defendant pretends, &c., and a general charge of the contrary of such pretences, is not an averment of the facts implied in the contrary charge. *Houton v. Reynolds*, 2 H. 264.

2. (*Title of plaintiff.*) An averment in a bill to restrain the setting up of outstanding terms in ejectment, that H. being *or claiming to be* entitled to the premises, devised them to the plaintiff, and *positively averring the title of the plaintiff* thereto, accompanied by statements showing that his claim was founded upon the devise: Held, to be sufficiently certain upon general demurrer. *S. C.*

3. (*Parties to supplemental suit.*) The rule is, as stated in *Dyson v. Morris*, 1 Hare, 413; L. M. No. 59, that where there is any question to be tried between the new defendant and the original defendants, the latter must be made parties to the supplemental suit, and it was so held in a case where the original plaintiff sued first as sole next of kin to recover from the executor a fund alleged to be undisposed of, and the new defendant was another party, who had been discovered to be also one of the next of kin, by preliminary inquiries, and against whom it was suggested the executor might have a different defence, such as the statute of limitations, which he was entitled to state on the record, instead of trying it, as was offered to him, by inquiry before the master. *Jones v. Howells*, 2 H. 342.

PORTION. (*Satisfaction by legacy.*) Estates were settled on A. for life, remainder to trustees for 1000 years, to raise 5000*l.* for the portions of his daughters and younger sons, and subject thereto, to A. in fee; provided that if A. in his lifetime, or by his will, should give to any of his children entitled to portions under the trusts of the term any sum of money, &c. for or towards their advancement in marriage or otherwise, the same should be taken in part or in full satisfaction (according to its amount) of the portion thereby provided for that child, unless A. should by writing under his hand declare to the contrary. A. had eight daughters and two younger sons. By his will, after reciting the trusts of the settlement as regarded the portions, he devises this estate, "subject to the 5000*l.* charged thereon as aforesaid," and also other estates, to trustees, in trust by sale or mortgage to raise money to supply the deficiency of his personal estate for payment of his debts and legacies, and, in the next place, to pay 2000*l.* to each of his younger sons; and he declared, that after the payment of his debts and legacies *and the sums of 2000*l.**, the estates, or such part thereof as should remain unsold for any of the purposes aforesaid (*subject nevertheless to any mortgage or mortgages which should be made by the trustees in pursuance of the power thereinbefore given to them for that purpose*), should go to his eldest son: Held, that the will did not contain any thing that was equivalent to a declaration that the legacies of 2000*l.* should not be a satisfaction for the portions of the two younger sons, and consequently that

they were not entitled to their legacies and also to their shares of the 5000*l.* *Papillon v. Papillon*, 11 S. 642.

POWER. (*Concurrence of appointee in excessive appointment.*)

A valid appointment may be made to persons not objects of the power, with the concurrence of those who are objects; and by an extension of this principle, it was held that in a settlement grounded upon an appointment to one who was an object of the power, and made with the concurrence of such appointee, a power might be reserved to such appointee to appoint to the wives or husbands of the objects of the original power. *Goldsmid v. Goldsmid*, 2 H. 187.

PRACTICE. (*Abatement—Party in two-fold capacity.*) Where trustees had been appointed under an order of the court to act with an executor in the administration of the personal estate of testator, and a bill was filed by such trustees and executor jointly, and the latter died: Held, that the suit had wholly abated, and that therefore it must be revived, not only against his representatives, but against all the original defendants. *Cave v. Cork*, 2 Y. & C. 130.

2. (*Confirmation of report.*) The plaintiff obtaining the order nisi to confirm the master's report, but not proceeding to make the order absolute, the defendant may move to confirm the report, and for that purpose the certificate of no cause shown will be ordered to be entered on his office copy of the order nisi. *Roberts v. Williams*, 2 H. 151.

3. (*Contempt—Pro confesso.*) A defendant in contempt for not answering the bill brought to the bar and remanded, and again brought up by habeas corpus twenty-eight days after having been remanded, upon motion to take the bill pro confesso, under the stat. 1 Will. 4, c. 36, s. 15, rule 2, may file his answer after the motion is made: and *semble*, at the latest time on that day. *Robinson v. Stanford*, 2 H. 149.

4. (*Contempt—Rights of party in contempt.*) *Semble*, Lord *Clarendon's* General Order, that after a contempt duly prosecuted to an attachment with proclamations returned, no plea or demurrer shall be admitted but upon motion in court, does not apply to the process at present substituted for attachment with proclamation. *S. C.*

5. (*Costs—Correcting mistake.*) Where a plea to the bill is filed, and the plea is overruled, with liberty to amend, and the amended plea is put in and allowed, the defendant is not entitled to the costs of correcting his own mistake, but is entitled to the costs which he would have had if the plea which was allowed had been the plea which was first filed. *Clayton v. Meadows*, 2 H. 26.
6. (*Costs—General order of taxation.*) Under a general order of taxation, the master will, without any special direction, exercise a discretion as to taxing the costs of informal proceedings. *S. C.*
7. (*Delivery of bill of costs.*) A party in a cause who has obtained and served, according to the twelfth amended order of August, 1841, an order that his solicitor shall deliver his bill of costs within a month, which is disobeyed, is entitled under the fifteenth order of August, 1841, to enforce obedience by the writ of attachment. *Lane v. Oliver*, 2 H. 97.
8. (*Entering appearance—Eighth order.*) The court will not make the order allowing the plaintiff to enter an appearance for the defendant, under the eighth order of August, 1841, after several months have elapsed since the service of the subpoena, unexplained, except upon notice. *Radford v. Roberts*, 2 H. 96.
9. (*Evidence—Re-examination of witness.*) A witness, called by the plaintiff, and cross-examined by the defendant, before the hearing, on a point not then in issue in the cause, allowed to be examined again by the defendant on the same issue, when raised before the master under the decree. *Whitaker v. Wright*, 2 H. 321.
10. (*Exceptions—Form of.*) Exceptions to the master's report ought to follow in form as well as in substance the objections carried in before the master. *Ballard v. White*, 2 H. 158.
11. (*Guardian ad litem.*) Testamentary guardian of an infant trustee, who was residing out of the jurisdiction, appointed guardian *ad litem* without either the appearance of the infant in court or a commission. *Skuttleworth v. Skuttleworth*, 2 H. 147.
12. (*Guardian ad litem—Married infant.*) The answer of a married woman, who is an infant, cannot be taken either separately or jointly with her husband, until she has had a guardian assigned. *Coleman v. Northcote*, 2 H. 147.
13. (*Lunatic—Guardian ad litem.*) The order appointing a solicitor

to be the guardian ad litem of a lunatic, not found so by commission, may be made under the twenty-eighth order of October, 1842, on the application of the plaintiff; but it cannot be made without service of notice upon the alleged lunatic. *Brooks v. Jobling*, 2 H. 155.

14. (*New orders—Appearance of defendant under twenty-third order.*) A defendant, against whom it is prayad that he may be bound by the proceedings, on service of a copy of the bill under the twenty-third order of August, 1841, may appear gratis before or after he is so served. *Barkley v. Lord Reay*, 2 H. 309.
15. (*Parties—Twenty-third order.*) Held, that an equitable tenant in tail of an estate devised in trust for sale, with full power of sale, was not a party who might be served with a copy of the bill, under the above order, the object of the order being to relieve plaintiffs from the necessity of proceeding against numerous parties in such cases. *S. C.*
16. (*Preliminary inquiries.*) Preliminary inquiries will not be directed, under the fifth order of the 9th May, 1839, if the direction involves a decision one way or the other of any question in the cause. *Curd v. Curd*, 2 H. 116.
17. (*Same point.*) Same decision in similar case. *Breeze v. English*, 2 H. 118.
18. (*Production of documents.*) Documents directed to be deposited with the clerk of records and writs, after an order allowing the plaintiff or his solicitors to inspect and take copies thereof at the office of the defendant's solicitors, the solicitors not agreeing by whom the copies were to be made. *Prentice v. Phillips*, 2 H. 152.
19. (*Retainer of defendant after disclaimer.*) Although a defendant disclaim all interest in the suit at the bar, and his disclaimer is entered by the registrar, yet the court will retain him on the record, if there be any question whether he has documents relating to the suit in his possession, which ought to be delivered up, and an inquiry will be directed on the subject. *Teed v. Carruthers*, 2 Y. & C. 31.
20. (*Service of copy of bill—Infant.*) Upon a motion for leave to enter a memorandum of service of a copy of the bill upon a defendant under the twenty-fourth of the orders of August, 1841, it is not necessary to show by affidavit that the defendant is not an infant. *Sherwood v. Rivers*, 2 Y. & C. 166.

21. (*Service of copy of bill—Verification.*) The court, in admitting the service of an examined copy, under the twenty-fourth order of August, 1841, observed that it ought to appear by affidavit in what way the truth of the copy had been ascertained. *Penfold v. Bouch*, 2 H. 157.
22. (*Same.*) Service of copy examined with office copy held good. *Coleman v. Rackham*, 2 H. 354.
23. (*Supplemental suit.*) After the trustees of a charity had put in their answer, and before the hearing, one trustee resigned and two died, and new trustees were appointed in their room, who were not made parties to the suit until after the hearing and judgment, when a supplemental information was filed against them, praying for the benefit of the former proceedings against them, and that they might be removed. The trustees by their answer made a case against the decree. Held, on exceptions for impertinence, that they were entitled to make such a defence. *Attorney-General v. Foster*, 2 H. 81.
24. (*Title of proceedings.*) An order to dismiss, for want of prosecution, obtained upon notice of motion, intituled in the name of the plaintiff and three defendants, where one of the defendants had been struck out by amendment, discharged with costs, as irregular. *Rowlatt v. Cattell*, 2 H. 186.
25. (*Same—Interrogatories.*) Where the original bill was filed by M. N. against A. B. and C. D., and A. B. having died before answer, leaving a son and heir of the same christian as well as surname, the suit was revived against him and C. D., and witnesses being examined, the commission was intituled correctly in the original revived suit, but the interrogatories were intituled as in a suit "in which M. N. is plaintiff, and A. B. and C. D. defendants." The court, adverting to the facts above stated, and also to the fact, that in a previous motion of the same sort, by the same party, nothing had been said about this ground of objection, refused, with some hesitation, a motion for suppressing the interrogatories. *Jones v. Smith*, 2 Y. & C. 42.

PRODUCTION OF DOCUMENTS. (*Delay in asking.*) Production of documents ordered after some of them had been marked as exhibits, although the plaintiff might thereby know which of them were intended to be used at the hearing. *Duke of Beaufort v. Taylor*, 2 H. 245.

2. (*Title deed of defendant.*) Title deed of the defendant ordered to be produced where it contained a recital that might affect him with constructive notice of the plaintiff's interest in the estate. *Neesom v. Clarkson*, 2 H. 166.

PURCHASER. (*Notice—Recital—Lapse of time.*) A. having contracted to purchase an estate, devised all his real estate to his widow, who afterwards married B., who in 1793 obtained a conveyance to himself in fee and a trustee for himself by a deed reciting the contract, the will and death of A., and the marriage, and "that thereupon B. became entitled to the beneficial interest in the purchase;" B. afterwards sold the estate to C. who took a conveyance from B. and his trustee, in which it was recited "that by certain conveyances in the law the property had been granted and conveyed to the use of B. and his trustee (naming him) in trust as to the estate of the latter for B.:" Held, that in a suit by the heir of the widow, that this recital was notice to the purchaser of the particulars of the conveyance to B., that no other title in B. was to be presumed, and that the right of the heir of the widow was not prejudiced by the lapse of ten years and a half since she became of age without asserting her claim. *Neesom v. Clarkson*, 2 H. 163.

REHEARING. (*Mistake as to law.*) Where in a creditor's suit an executor had omitted to go into evidence before the hearing against the debt, supposing that he might do so before the master, but assets being admitted, he could not do so, and a decree for payment was made, and the executor applied for a rehearing on the ground of his mistake in the law, but did not give any evidence of his having been misled, the court refused a rehearing, but allowed the case to stand over for the plaintiff to bring an action, of which the executor was to pay the costs in any event. *Woodgate v. Field*, 2 H. 211.

SALE UNDER DECREE. (*Decree impeachable by infants.*) Where in a suit to carry into effect the trusts of a will, one of which was for sale of an estate at the death of a particular person, a decree was made for sale during the life of such person, no special ground for such anticipated sale being shown, and some of the parties interested in the proceeds were infants: Held, that a good title could not be made under the decree. *Blacklow v. Laws*, 2 H. 40.

SEPARATE USE. (*Construction of the word "proper."*) Where the testator directed an annuity to be paid by the trustees "into the *proper* hands of his daughter A. for her own proper use and benefit," the court, upon the authority of *Tyler v. Lake*, 2 R. & M. 183, reluctantly decided that this was not a trust for the separate use. *Blacklow v. Laws*, 2 H. 49.

SETTLEMENT. (*General words—Property after-acquired.*) A woman being entitled to personal estate under an English will, and also to shares of real and personal estate under an American will of the same testator, which wills did not either of them refer to the other, previous to her marriage executed a settlement, by which, after describing the property to which she was entitled exclusive of that under the American will, and reciting an agreement "that such other property as she should become entitled to should be settled in the same way," and after assigning the property described, she covenanted "to assign all such other personal property (if any) as should during her life become vested," the interest in the American property being then vested. The court, without giving any opinion on the cases of *Graffey v. Humpage*, 1 Bea. 46; *Law Mag. No. 46*; *James v. Durant*, 2 Bea. 177; *Law Mag. No. 51*; and *Blythe v. Granville*, 6 Jur. 961; decided that the American property was not included in the settlement. *Hoare v. Hornby*, 2 Y. & C. 121.

SHIP. (*Order and disposition—Jurisdiction.*) The mortgagee of a ship by bill of sale, who has omitted to procure an endorsement thereof on the certificate of registry within thirty days after the return of the ship to port, as required by the registry act,—the registered owner having after that time become a bankrupt,—has no equity, distinct from his legal rights, to restrain the sale of the ship by the assignees; the title to the ship, after the bankruptcy, depending upon the application of the rule of law as to order and disposition. *Campbell v. Thompson*, 2 H. 140.

SOLICITOR AND CLIENT. (*Privileged communication.*) To entitle confidential communications to protection it is not necessary that they should have been made in contemplation of the suit; it is sufficient if they relate to and were made in the course of the dispute which is the subject of the suit. *Clagett v. Phillips*, 2 Y. & C. 82.

2. (*Purchase from client.*) In such cases it is the general rule that the onus of showing the transaction to have been fair lies upon the solicitor, but the nature and degree of the evidence required for that purpose will vary according to the mode of employment of the solicitor, and to the influence which his position may appear to have given him either as to costs or otherwise. In such a case, where the price was shown to have been fair with reference to the surface value of the land (which was alone there usually looked to in purchases in that part of the country), but shortly after the purchase, the coal which was known to both parties to be under the soil, acquired great additional value from the formation of a railway—the transaction, which had taken place seventeen years before the bill was filed, was sustained, although a large part of the consideration was a bill of costs due to the solicitor, for which a previous mortgage had been given; but the court referred the bill to the master, to inquire whether there were any and what items improper and such as would not have been allowed upon taxation, the court reserving further directions. *Edwards v. Meyrick*, 2 H. 60.

SPECIFIC PERFORMANCE. (*Acts to be done.*) The court thought that it had jurisdiction to enforce the specific performance of a contract by a defendant to do defined work upon his property, in the performance of which the plaintiff had a material interest, and which was not capable of adequate compensation in damages, and accordingly in a suit against a railway company to enforce performance of an agreement to build an arch and make approaches to it, the company having declined to avail themselves of a defect in the pleadings, the court gave the relief asked for. *Storer v. Great Western Railway Company*, 2 Y. & C. 48.

2. (*Mutuality—Title made good after contract.*) Specific performance of a contract for sale of an estate in fee-simple decreed (subject to the usual inquiry as to title) in favour of a vendor, who at the time of the contract was tenant for life only; the purchaser not having rejected the purchase as soon as he had ascertained the real position of the vendor, and the vendor being able by means of the consent of the parties interested in remainder to make a good *prima facie* title to the fee-simple at the hearing. *Salisbury v. Hatcher*, 2 Y. & C. 54.

TENANT FOR LIFE. (*Permanent improvements.*) A tenant for life cannot lay out moneys in building or improvements on the estate, and charge them on the inheritance; and, therefore, the court will not direct an inquiry as to what sums were expended by the tenant for life in substantial improvements beneficial to the inheritance. *Caldecott v. Brown*, 2 H. 144.

TRUST. (*Discretion—Prospective directions—Delegation.*) Devise and bequest of freehold, copyhold, and personal estate, upon trust for sale at the discretion of the trustee, and that the rents, interest, and proceeds should be divided amongst a class, either equally or in other proportions, as the trustee, having regard to their circumstances, should appoint; followed by an unattested codicil, directing the application of such rents, interest, and proceeds for the benefit of such of the class as were unmarried or unsettled, and particularly for the comfortable support of P., (one of the class), who was of weak mind; and in case the trustee should not live to perform the whole trust, the rest to be executed by any persons he might appoint, having regard to the said intentions. The trustee by deed directed the manner in which the estates should be sold, and the proportions of the proceeds applied, and directed the division thereof amongst the other objects to be postponed until after the death of P., and nominated other persons to execute the trusts, which might remain unexecuted at his (the trustee's) death, with the same discretionary power that he had himself: Held, that the trustee, for the government of his own discretion, might properly have regard to the directions of the unattested codicil, even as to the proceeds of the real estate, so far as he was not restrained by the effect of the will; that the prospective directions in the deed of appointment were not necessarily invalid, especially those which related to the future maintenance of P., and that the attempt to delegate powers which the trustee could not transfer did not invalidate the directions in the same deed which he had power to give. *Hitch v. Leworthy*, 2 H. 200.

2. (*Implication—Uncertainty.*) A person, who occupied a large farm under a lease, and who had by the outlay of capital considerably increased its value, having fallen into difficulties, the lease was surrendered by the trustees, to whom he had assigned it and his effects, to his landlord. His wife's brother then applied to the

landlord to become tenant for the remainder of the lease upon the same terms—"with the view," as he stated in his application, "to benefit his sister and her unfortunate family," and with that view, as the landlord stated in the correspondence and also in his evidence, the lease was granted, and he was allowed for the same purpose, contrary to the usual practice of the same landlord, to have a co-lessee, who was the actual occupier, and also to sublet a part, by which means he derived a clear 100*l.* a year above the rent, which was paid by the co-lessee: Held, in a suit against the executor of the brother, that there was a trust as to this 100*l.* a year for the wife of the original tenant and her children as joint tenants. *Morton v. Stewart*, 2 Y. & C. 67.

VENDOR AND PURCHASER. (*Power to rescind contract.*)

Where it was one of the conditions of sale that in case the purchaser should take objections to the title which the vendor should be unable or unwilling to remove, the vendor should be at liberty to rescind the contract, it was held, upon the authority of *Tanner v. Smith*, 10 S. 410, (L. M. No. 55,) and *Cutts v. Thody*, (before the same judge, not yet reported,) that a treaty, not expressly without prejudice, between the vendor and purchaser for the completion of the title by the former, after objections taken by the latter, was a waiver of the condition, and the court expressed an intention of discouraging such conditions. *Semble*, that though the vendor in such a case would not be allowed to deliver an abstract purposely defective in order to avail himself of the right to rescind upon objection taken, he is bound only to deliver a *bona fide* abstract of such title as he has at the time of making it out, and is not bound to deliver a further abstract of title afterwards acquired. *Morley v. Cooke*, 2 H. 106.

2. (*Time of objecting to title.*) The conditions of sale provided that all objections to the title disclosed by the abstract, not taken within a certain time after delivery of the abstract to the purchaser, should be deemed to be waived: Held, that the time for objecting was not to be computed from the time of the delivery of an imperfect abstract; and that the purchaser was not precluded from taking an objection after the time fixed on, which arose out of evidence called for before the expiration of that time. *Blacklow v. Laws*, 2 H. 40.

VOLUNTARY DEED. (*Assignment of stock and shares.*) A father by deed-poll, expressed to be made in consideration of natural love and affection, declared among other things that he transferred and assigned to his daughter, upon trust for her and her children some East India stock and shares in a company, with full power in his name to sue for and recover such part of the property comprised in the deed as a mere assignment would not enable her to recover and receive. The deed was sealed and delivered in the usual way, but was retained in possession of grantor till his death, when it was found enclosed in a paper with an endorsement in his handwriting describing it as "papers concerning Mrs. C. and her children," and directing it to be given up to Mrs. C. at his death, and immediately: Held, that as to the stock and shares, the deed-poll was inoperative. *Dillon v. Coppin*, 4 M. & C. 647.

2. (*Conveyance of freehold—Question at law.*) The validity of a voluntary deed affecting freehold, which the grantor had retained in his possession, was held to be a question of law, which the court refused to decide. *S. C.*

3. (*Right of one, not a party.*) A. instituted a suit against B. and C. respecting a sum of 4000*l.*, D. also was made a party to the suit, but, having no interest, he disclaimed. A., B., and C. afterwards came to a compromise, in pursuance of which they executed a deed, assigning the 4000*l.* to trustees, in trust to pay to D. his costs of the suit, and to divide the rest of the fund amongst A., B., and C.—D., though he was not a party either to the compromise or to the deed, filed a bill against A., B., and C., and the trustees, to compel a performance of the trusts and payment of his costs. A demurrer, which had been first overruled by the vice-chancellor, was allowed by the lord chancellor on appeal. *Gibbs v. Glamis*, 11 S. 584.

WILL. (*Construction—Direction to settle upon A. and his heirs in strict entail.*) Testator having by his will devised an estate to his grandson A. for life, with remainder to his first and other sons in tail male, with remainder over, afterwards by a codicil devises the estate to his daughter for life, remainder to "A. and his heirs in strict entail as by his will directed," he then directed that A. should not be put in possession till the age of thirty-one, and, in failure of issue of A., he ordered that the estates should go as by

the will directed. The court, advertent to the clause postponing the possession, which would be nugatory if A. was to be tenant in tail, and also observing that a strict mode of construction would, if applied to the words "in failure of issue," defeat the limitations over, held, in accordance with the certificate of the court of queen's bench, that A. was tenant for life. *Graves v. Hicks*, 11 S. 536.

2. (*Construction—Distributive trust.*) Testator appointed three persons and their respective heirs and assigns his executors, and gave to them and to their *respective* heirs and assigns all his real and personal estate, in trust for the purposes after set forth: and first, that they and their respective heirs and assigns should sell his real estates, and he empowered them and their respective heirs and assigns to convey the estates. One of the trustees and executors having died after the death of the testator, the other two contracted to sell the estate: Held, in a suit by them against the purchaser, that they could make a good title without the concurrence of the heir of the deceased trustee. *Jones v. Price*, 11 S. 557.
3. (*Construction—Divesting on contingency.*) Held, that a gift of personalty to be divided among certain parties after the death of A., and in case of the death of any of them leaving issue in A.'s lifetime, then such issue to take the parent's share, gave an absolute interest to a legatee dying in A.'s lifetime without issue. *Gray v. Garman*, 2 H. 268.
4. (*Construction—Gift to husband and wife.*) The testatrix gave the residue of her real and personal estate equally between her brother, her sister, and her "nephew W., and E. his wife," (E. being the niece of the testatrix.) Held, that the husband and wife took one share each, and not merely one share between them. *Warrington v. Warrington*, 2 H. 54.
5. (*Construction—Survivorship—Substitution.*) Testator, having given certain property to his wife for life, gave part of it at her death to "his *then* surviving children," and the other part to "the surviving female children." "On the decease of any of the children," if without issue, the share was to go to the survivor, if with issue then to such issue. A daughter, having survived the testator, married and died in the lifetime of the widow having children: Held, that neither she nor her children took any thing. *Wordsworth v. Wood*, 4 M. & C. 641.

6. (*Construction—Same.*) Gift by a testator of his real and personal estate to his wife for her life, and the residue to be equally divided between her brothers and sisters, and in case any of *them* should be dead at the time of her decease, leaving issue, such issue to stand in their parent's place: Held, that the children of brothers and sisters who had died before the date of the will, took nothing either by way of substitution or by way of substantive gift. *Gray v. Garman*, 2 H. 268.
7. (*Construction—State of property.*) A gift by will of all the interest of the testatrix in certain stock, followed by a codicil, directing that a debt owing to her should at her death be laid out in the same stock, will not pass the amount of the debt to the legatee of the stock. *Havard v. Price*, 2 H. 98.
8. (*Construction—Vesting.*) There is no absolute rule that in a case where there is no bequest distinct from the direction to pay, the vesting is postponed till the time of payment, but the construction will depend upon the nature of the event or contingency upon which the payment is to be made, as importing or not importing a condition.
Accordingly, where a residue was given to trustees to sell, get in, and divide among the testator's children, so soon as the youngest should attain twenty-one, and in case of the death of any leaving lawful issue, such issue to take the parent's share: it was held that the share of one of the children who attained twenty-one, and then died without issue before the youngest had attained that age, had vested and passed to his representatives. *Leeming v. Sherratt*, 2 H. 14.
9. (*Construction—Vesting—Legacies charged on land.*) The rule, that future legacies payable out of real estate do not vest till the time of payment, will be made to give way when an opposite intention can be clearly implied from the will. *Brown v. Wooler*, 2 Y. & C. 134.
10. (*Construction—Vesting—Payment.*) Where a fund was given to be divided upon the death or alienation by tenant for life, among his children who should attain twenty-one, and the gift over took effect upon his bankruptcy, there being then three children, of whom two had attained twenty-one, the court allowed them the dividends of one-third each, but refused them the capital. *Brandon v. Aston*, 2 Y. & C. 30.

11. (*Copyhold—Evidence.*) The probate copy of a will is not a sufficient authentication of it so far as it relate to copyholds. *Archer v. Slater*, 11 S. 507.
12. (*Heir at law claiming as devisee—Right to issue.*) An heir at law admitting by his answer the execution of the will under which the plaintiff claimed, but alleged another will, revoking the former and giving the estate to himself, which he said had been destroyed by mistake, but did not go into any evidence of the second will or its destruction: Held, that he was not entitled to an issue as to the validity of the first will, though the plaintiff, by reading the statement in the answer as to the second will, had made it evidence. *Whittaker v. Newman*, 2 H. 299.

ECCLESIASTICAL.

[Selections from 3 Curteis, Part 1.]

ADMINISTRATION. (*Citation of next of kin dispensed with.*)

Administration, during minority, granted to the guardian elected by a minor, without citing his next of kin, one of whom was abroad, the minor and his guardian having interest under the will. *In the goods of Widger*, 3 Cur. 55. (Prerog.)

2. (*Citation of next of kin—Lunatic.*) Where two sisters, one of them imbecile, were entitled equally under a will to an estate, and administration with the will annexed had been granted to the sane sister, administration *de bonis non* was granted to her executors without citing the next of kin of the imbecile sister, who were very numerous. *In the goods of Southmead*, 3 Cur. 28. (Prerog.)

DIVORCE. (*Adultery—Proceedings at law.*)

Although in cases of separation by reason of adultery, proceedings at law are generally unnecessary, yet they are of great importance where there is any doubt in the evidence of the fact, and particularly as to the identity of the wife with the party to whom the evidence applies. *Dillon agst. Dillon*, 3 Cur. 96. (Consist.)

2. (*Antenuptial incontinence.*) This cannot be pleaded by either party in the original libel, marriage being a condonation of such conduct; but it may be pleaded by the husband in reply to a de-

fence by wife setting up neglect and collusion, and the fact of previous cohabitation or the circumstances attending it may also be used by the wife as a defence, for the purpose of showing want of proper vigilance and regard for her morals in her husband. In this case the fact of the incontinence was disclosed by one of the exhibits of the husband, being the marriage certificate of the husband, which, according to the law of France, where the marriage took place, disclosed the fact of the birth of a child before marriage. *Graves* agst. *Graves*, 3 Cur. 235. (Consist.)

3. (*Condonation.*) Cohabitation with the wife after the receipt of credible information as to her adultery, though not amounting to condonation, is a fact for the consideration of the court, where there is any doubt as to the adultery. *Dillon* agst. *Dillon*, 3 Cur. 96. (Consist.)
4. (*Cruelty.*) Held, that a charge of cruelty was not rendered admissible as a defence by an averment that it was designedly committed with the view of inducing the adultery, and thereby enabling the husband to obtain a separation from his wife. *S. C.*
5. (*Evidence—Declaration.*) Held, that declarations of the husband, expressive of a desire to get rid of his wife, were admissible, as tending to elucidate his conduct in reference to the facts of the case. *S. C.*

EVIDENCE. (*Impotency.*) Sentence of nullity of marriage by reason of the impotency of the husband pronounced, without the inspection of his person. *Sparrow* agst. *Harrison*, 3 Cur. 16. (Consist.)

EXECUTOR. (*Appointment by substitution.*) Where testatrix appointed A. and B. executors, and in case of the death of either of them, empowered the survivor to choose another, "and so to continue to the true intent and meaning of two executors," and upon A.'s death, B. appointed C., who did not prove in B.'s lifetime: Held, that C. might prove afterwards, and might appoint another executor to act with him. *In the goods of Deichman*, 3 Cur. 123. (Prerog.)

2. (*Executors of acting executor.*) Probate refused to the executors of the only executor who had proved, the other executor, who had renounced, being still alive. *In the goods of Smith*, 3 Cur. 31. (Prerog.)

FOREIGN WILL. (*Turkish domicile.*) By the law of Turkey no subject of that country can make a will, but by a treaty between Great Britain and Turkey an English subject domiciled there may make a will. The son of an Englishman who had died domiciled at Smyrna, and who himself was also domiciled there, having been in this country during six years only for the purpose of education, made a will not duly attested according to English law: Held, that his will could only be entitled to probate as that of an English subject, and that in that character it must be executed in the form required by our laws. *Maltass agst. Maltass*, 3 Cur. 231. (Prerog.)

HUSBAND AND WIFE. (*Wife's proxy.*) Probate with will annexed refused to attorney of wife, a residuary legatee, her husband refusing to join in the proxy. *Bubbers agst. Hardy*, 3 Cur. 50. (Prerog.)

LEGATEE. (*Description—Official character—Change of office.*) A testator appointed the archbishop of Tuam for the time being an executor of his will, the archiepiscopal jurisdiction of Tuam having been abolished by stat. 3 & 4 Will. 4, c. 37, probate was granted to the bishop of Tuam. *In the goods of Haynes*, 3 Cur. 75. (Prerog.)

PLEADING. (*Double plea—Divorce and condonation.*) Held, that it is competent for a wife in a suit for divorce by reason of adultery, first to deny the charge, and secondly to plead condonation. *Dillon agst. Dillon*, 3 Cur. 86. (Consist.)

PRACTICE. (*Evidence—Release of witness after publication.*) The court refused after publication of the evidence to rescind the conclusion of a cause, for the purpose of releasing and re-examining the solicitor who drew the will propounded, and who, upon his cross-examination as a witness in support of the will, had admitted that he retained the proctor in the cause, and was responsible to him for the costs, although the witness made affidavit that he had not seen the depositions. *Rendall agst. Rendall*, 3 Cur. 119. (Prerog.)

2. (*Reciprocal rights in same suit.*) A libel by a husband in a suit of nullity of marriage having been rejected: Held, that it was competent to the wife, in that suit, without taking out a cross-citation, to sue the husband for restitution of conjugal rights. *Clowes agst. Clowes*, 3 Cur. 194. (Arches.)

WILL. (*Attempted alteration.*) A testator executed his will, containing a legacy of *fifty* pounds to S. S., subsequently to the execution he erased the word *fifty*, and substituted the word *thirty*. The alteration not being attested, probate was granted with the original word *fifty* inserted. *Soar agst. Dolman*, 3 Cur. 121. (Prerog.)

2. (*Attestation—by witnesses at different times.*) The deceased, having signed his will, acknowledged the signature in the presence of one witness, who subscribed his name to the will, and on a subsequent day he acknowledged the signature to another witness, who subscribed his name, the former witness being present at the time, but he did not again subscribe his name. Probate refused. *In the goods of Simmonds*, 3 Cur. 79. (Prerog.)

3. (*Attestation—Same.*) A testator signed a codicil in the presence of a witness (his sister), who, at his desire, attested and subscribed it. On a subsequent day, when his sister and another person were present, he desired her to bring him the codicil, and requested the other person present to attest and subscribe it, saying, in the presence of both parties, and pointing to his signature, "This is a codicil signed by myself and by my sister as you see; you will oblige me, if you will add your signature, two witnesses being necessary." That party then subscribed in the presence of the testator and his sister, the latter, who was standing by him, pointing to her signature, and saying, "There is my signature, you had better place yours underneath," she did not however resubscribe: Held, that the instrument was not sufficiently attested, under 1 Vict. c. 26, s. 9. *Moore agst. King*, 3 Cur. 243. (Prerog.)

4. (*Attestation—Paper not described as will.*) A. B., (deceased), requested two persons present at the same time "to sign a paper for him," which they did in his presence; the paper was so folded that the witness did not see any writing whatever on it; A. B. did not state what was the nature of the paper in question. On the death of A. B., it was found to be his intended will: Held, that it was not entitled to probate, the provisions of the ninth section of the 1 Vict. c. 26, not having been complied with. *Hott agst. Genge*, 3 Cur. 160. (Prerog.)

5. (*Attestation—Presence of testator.*) Probate refused of a will signed by the deceased in the presence of two witnesses, but sub-

- scribed by them in an adjoining room, communicating with folding doors, but in such a situation that the deceased would not see them. *In the goods of Colman*, 3 Cur. 118. (Prerog.)
6. (*Attestation—Sealing by witnesses.*) Probate refused of a will signed by the deceased *after* the witnesses had subscribed their names, the witnesses having subsequently to the signing by the deceased placed seals opposite to their names. *In the goods of Byrd*, 3 Cur. 117. (Prerog.)
7. (*Description of legatee—Evidence.*) Testatrix appointed as one of her executors, with a legacy of 1000*l*. “lord Sackville,” whom in another part of the will she called “lord George Sackville,” there was nobody answering the description, but there was Charles, duke of Dorset, who was also lord Sackville, and had been known by the latter title during the period of his intimacy with the deceased, and there had been a brother of his “the hon. George Germaine,” who also had been intimate with the deceased, but who died three years before the date of the will. Probate granted to the duke. *The Duke of Dorset agst. Lord Hawarden*, 3 Cur. 80. (Prerog.)
8. (*Evidence—Incompetency of one witness.*) A paper of a testamentary nature was produced by a sole legatee named in it: it purported to be signed by the testator and to be attested by two witnesses, one of whom had, subsequently to the date of the paper in question, married the legatee. The evidence of the other witness, whose credit and testimony were unimpeached, entirely supported the factum of the paper: Held, that his sole testimony could not sustain the paper, the circumstances being against the probability of such a will. *Mackenzie agst. Yeo*, 3 Cur. 125. (Prerog.)
9. (*Evidence—Particulars—Execution.*) Where one only of the witnesses deposed by affidavit to the will being signed in the presence of himself and the other witness, but such other witness had no recollection as to that point, probate was granted. *In the goods of Hare*, 3 Cur. 54. (Prerog.)
10. (*Evidence—Probate on discordant testimony.*) A paper admitted to probate on the testimony of one of the two attesting witnesses, although the other deposed that it was not signed by the testator in his presence; the circumstances of the case, of which one was

- a formal attestation clause, favouring the supposition of a due execution, and the first witness having, in an affidavit sworn a few days after the will was made, deposed to the due execution, the second witness not having been examined until two years and a half afterwards. *Gove agst. Gaven*, 3 Cur. 151. (Prerog.)
11. (*Execution by blind person.*) Probate granted of the will of a blind person not read over to testatrix in the presence of the witnesses but proved by solicitor to have been prepared from her instructions. *Fincham agst. Edwards*, 3 Cur. 63. (Prerog.)
 12. (*Place of signature—Printed form.*) Testator signed his name at the bottom of a printed form, ending on the second side of a sheet of paper, the will itself ending on the first side: Held, that the will was duly signed at the "foot or end thereof." *In the goods of Carver*, 3 Cur. 29. (Prerog.)
 13. (*Reference to an unattested paper.*) Probate granted of two instruments as one will, one of them, which was most clearly referred to by the other, being the will of another person previously deceased, and which will was not in the possession of the testatrix. *In the goods of the Countess of Durham*, 3 Cur. 57. (Prerog.)
 14. (*Same.*) Probate granted of an unexecuted paper as part of the will of the testator, the reference being undoubted and reciprocal, and the paper being annexed to the will. *In the goods of Willesford*, 3 Cur. 77. (Prerog.)
 15. (*Same.*) Reference being made in a will to a deed, so as to make it part of the will of the testator, probate allowed of the will and a notarial copy of the deed. *In the goods of Dickens*, 3 Cur. 60. (Prerog.)
 16. (*Proof in wrong court.*) Where the will was proved in the wrong court, testator having effects out of that jurisdiction, and the executor having died before the estate had been fully administered, administration *de bonis non* was asked from the Prerogative court as for the part left unadministered, it was refused, except upon the footing of the value of the whole original estate. *In the goods of Hogg*, 3 Cur. 61. (Prerog.)

PRIVY COUNCIL.

[Selections from 2 Moore, Part 3.]

MARRIAGE. (*Evidence—Admission—Certificate.*) *Semble*, that in suits for divorce the admission of the marriage by the respondent party is not sufficient. In this case there was no distinct admission, but the wife had applied for and obtained alimony pending the suit, and the certificate of the marriage had been put in as an exhibit, and further evidence of the marriage was required in the privy council. *Mellin v. Mellin*, 2 M. 493.

PATENT. (*Extension—Condition.*) Where the inventor, a mechanic, had assigned his interest to the patentee, his master, the judicial committee, under the circumstances, made it a condition of their recommendation to the crown to prolong the term of the patent, that the assignees of the patent should secure the inventor an annuity during the period of the extension. *Re Russell's Patent*, 2 M. 496.

2. (*Extension—Grounds.*) Term of letters patent for improvement in manufacturing gas tubes extended by the judicial committee, under the 5 & 6 Will. 4, c. 83, for six years, on the ground of the great merit and utility of the invention, and the inadequate remuneration in consequence of litigation, necessary for the protection of the patent right. *S. C.*

3. (*Extension—2 & 3 Vict. c. 67.*) By the 5 & 6 Will. 4, c. 83, s. 4, it is provided, "that no extension shall be granted if the application shall not be made and prosecuted *with effect* before the expiration of the term originally granted in such letters-patent:" Held, by the judicial committee, that the petition for such prolongation must be brought to a hearing before the expiration of the letters-patent, and that the pendency thereof is not sufficient to bring it within the proviso.

This rule was acted on where the petitioner had been prevented prosecuting his petition before the expiration of the letters-patent by the conduct of parties objecting, and from the circumstances of the judicial committee not being sitting, but the 5 & 6 Will. 4, c.

83, s. 4, having been repealed by the 2 & 3 Vict. c. 67, their lordships, upon a fresh petition, granted an extension of the letters-patent for seven years under that act, on the ground that the invention was an ingenious one, and that it did not appear that the patentee had received any remuneration within the three years previous to the expiration of the patent. *Re Bodmer's Patent*, 2 M. 471.

4. (*Practice under 2 & 3 Vict. c. 67.*) The rules enacted for practice in patent cases under the 5 & 6 Will. 4, c. 83, must be observed in an application for a prolongation, under the 2 & 3 Vict. c. 67. *S. C.*

WILL. (*Evidence—Materiality.*) As evidence of friendly intercourse with parties benefited by a doubtful will is admissible in favour of that will, so also is evidence of friendly intercourse with relations not benefited by such will admissible against it, though of very slight weight. *Hitchings v. Wood*, 2 M. 355.

DIGEST OF AMERICAN CASES.

[Selections from 4 Harrison's (New Jersey) Reports; 1 Howard's (United States) Reports; 4 Hill's and 9 Paige's (New York) Reports.]

ACTION. In an action founded on a statute, giving a new remedy, where none existed at the common law, the declaration ought to show whence the plaintiff derives his cause of action. *Thorpe v. Rankin et al.*, 4 Harrison 191.

2. In such action, the declaration ought to set forth specially the facts and circumstances, the existence of which are necessary to entitle the plaintiff to the action given by the statute; unless the statute itself prescribes the form of a declaration, or declares what shall be deemed a sufficient one. *Ib.*

3. An action on the case against a sheriff for an escape, or for taking an insufficient bail bond, does not survive, and cannot therefore be continued against his personal representatives. *Cunningham v. Jaques, Sheriff, &c.*, *ib.* 192.

AMENDMENT. After argument of a general demurrer to several special pleas in bar and judgment for the plaintiff on that demurrer, overruling the special pleas, the plaintiff was permitted to amend his declaration by adding a new count, stating another injury done him by means of the same wrongful act complained of in the declaration. *Ten Eyck v. The Delaware & Raritan Canal Company*, *ib.* 5.

2. Amendments are now entirely in the sound discretion of the court, and will be allowed wherever the advancement of justice requires it. *Ib.*

3. Each case must depend upon its own particular circumstances. *Ib.*

ASSUMPSIT. To maintain the action for use and occupation, there must be established the relation of landlord and tenant, a holding by the defendant under the knowledge of the plaintiff's title or claim, and under circumstances which amount to an acknowledgment of or acquiescence in, such title or claim, and an agreement or permission on the part of the plaintiff. The action will not lie

where the possession has been acquired and maintained under a different or adverse title, or where it was tortious and makes the holder a trespasser. *Lloyd v. Hough*, 1 Howard 153.

2. If a plaintiff has, at the defendant's request, discharged a sum of money or debt due from the defendant to any other person, by applying his own money, goods, chattels, sureties or lands to such discharge, he may recover the amount so paid or satisfied, in an action of general indebitatus assumpsit, for money paid, &c. *Cook admn. Linn*, 4 Harrison 191.
3. But the plaintiff cannot upon such a count, recover more money than he actually paid, whether the payment was made in money or in any thing else. *Ib.*
4. If a plaintiff has expended money for the defendant, under a special agreement, in a particular way or for a specific object, to be repaid at a given day, he may after performing his part of the contract and after the expiration of the time, recover *the money so expended*, in an action for money paid: but he cannot, *in such action*, recover any advance or premium on his outlays, or any compensation for his risk or trouble, although by the terms of the special agreement, the defendant was to make him such allowances. If the plaintiff goes for such additional compensation, he must declare upon and prove his special agreement. *Ib.*
5. A. sold certain lands to W., who gave back a bond and mortgage, which the former assigned to one T.; and afterward, W. re-conveyed to A., taking from him an indemnity against the bond. A. then conveyed the lands to B., covenanting for quiet enjoyment; and B. conveyed them to H. by a quit-claim deed. T. thereupon proceeded to a foreclosure of the mortgage in chancery, and, on the sale, H. became the purchaser: Held, that H. might recover against A. the purchase money paid on the mortgage sale, in an action of assumpsit as for money paid &c. to A.'s use. *Hunt v. Amidon*, 4 Hill 345.

ATTORNEY. In order to give the right of proceeding summarily against an attorney to compel the payment over of money in his hands, it is not essential that he should have received the money in any suit or legal proceeding, or that he should have been employed to commence legal proceedings. *Per* Bronson J., *Matter of Dakin*, ib. 42.

2. It is enough if the money was received by the attorney in his professional character: as, where the demand on which he received it was left with him under instructions to call for payment, or obtain better security, but without any directions to sue. *Ib.*
3. Otherwise, if the circumstances be such as not to afford a presumption that he was entrusted in the transaction by reason of his professional character. *Ib.*
4. On an application for an order that D., an attorney, pay over moneys received by him for R., it appeared that L., who was a land-agent, took a bond and mortgage in favour of R. and sent him the bond, but retained the mortgage for the purpose of receiving payments on it; that several years afterward, L., with the assent of those for whom he acted, among whom was R., transferred his land-agencies to D. who attended chiefly to that kind of business: that D. never had the bond in his possession, nor had he instituted proceedings to collect the mortgage, or been instructed to do so; but he received several sums of money on the mortgage and refused to pay them over, though demanded: Held, not a case for the summary interference of the court, and the motion was therefore denied. *Ib.*
5. A sealed instrument, when executed by one acting as attorney, must be executed in the name of the principal, and purport to be sealed with his seal. *Townsend v. Hubbard*, ib. 351.
6. Accordingly, where a covenant for the sale and purchase of lands was subscribed only with the names of B., H., and O., and commenced thus: "Articles, &c., made, &c., between T., &c., by B. *their attorney*, of the first part, and H. and O. of the second part, witnesseth;" and the concluding clause was thus: "In witness whereof the said B., *as attorney of the parties of the first part*, and the said parties of the second part, have hereunto set their hands and seals," &c.: Held, that the covenant did not purport to have been executed by T. &c., and that they could not maintain an action upon it. *Ib.*

BANKRUPTCY. Upon questions adjourned from the district to the circuit court of the United States, under the "act to establish a uniform system of bankruptcy throughout the United States," the district judge cannot sit as a member of the circuit court. (*Dis-sentiente* Taney C. J. and Catron J.)

Consequently the points adjourned cannot be brought before the supreme court by a certificate of division of opinion.

(Chief justice Taney assents that a division of opinion in such a case cannot be certified to the supreme court, but for the reason "that the act of congress of 1802, authorizing the certificate of division where the judges of the circuit court are opposed in opinion, does not apply to the peculiar and summary jurisdiction directed to be exercised in cases of bankruptcy.")

Nor will an appeal or writ of error lie from the decision of the circuit court, and it is conclusive on the district judge.

(Per CATRON J. *dissentiente*. "It is not possible to reach this court by appeal in a bankrupt case. This is clear; and my brethren think it equally clear, that no adjourned question can be brought here by a division of opinion: it follows, this court has no revising power over the numerous and conflicting constructions of the bankrupt law. In some circuits it is held, that one indebted "in consequence of a defalcation as a public officer; or as executor or administrator, guardian or trustee, or while acting in any other fiduciary capacity, "can be discharged from all his other debts; and that the less favoured creditors may take all his property, unless the government, ward, &c. see proper to come in for distribution; when the fiduciary claim will also be extinguished. In other circuits, those indebted to any amount in a fiduciary capacity are all excluded as a class: the fact appearing on the face of the petition it is dismissed of course. Such is the construction of the act in the eighth circuit; it has excluded from applying great numbers in the eighth and other circuits, who would have been admitted had they applied in circuits where the law is construed otherwise. This question has also been brought here by a division of opinion from the district of Kentucky, at the instance of the district and circuit judges, acting together as the circuit court; the question having been adjourned into that court by the district judge.

"In the case of William Nelson, the question occurred in the same court, whether the bankrupt law was unconstitutional and void or otherwise. It was adjourned as already stated into the circuit court by the district judge; and there the judges were opposed in opinion and certified the question to this court for its deci-

sion. This was done at the instance of the bar of St. Louis; the district judge of Missouri having pronounced the bankrupt act a mere insolvent law; such as was never contemplated by the framers of the constitution, and therefore void." "Pursuant to the opinion, decrees were entered, dismissing the first cases presented for final discharges in the district of Missouri; and some twelve hundred more, depending in that court, will be dismissed, unless the decrees are reversed which have been entered. It was thought by the circuit judge, due to the country at large and to the parties concerned, that this important question should meet with the speedy decision of this court; and therefore it was brought here.

"No law that congress ever passed, has in it to a greater degree, the elements of various construction and confusion, than the bankrupt law of 1841, when administered by more than thirty judges, acting separately; if all are exempt from the revising power of this tribunal created for the purpose (amongst others) of producing uniformity of decision and construction in all cases over which its jurisdiction extends.") *Nelson v. Garland*, 1 Howard 265.

2. The act of congress of 1841, entitled "an act to establish a uniform system of bankruptcy throughout the United States," is constitutional. *In the matter of Edward Klein*, *ib.* 277. Decision of judge Catron in the 8th circuit.

BANKS. Whenever a banker has advanced money to another, he has a lien on all the paper securities which are in his hands for the amount of his general balance, unless such securities were delivered to him under a particular agreement. *Bank of the Metropolis v. New England Bank*, 1 Howard 239.

BILLS OF EXCHANGE AND PROMISSORY NOTES. The endorsee of a promissory note, payable *on demand*, must use due diligence: that is, he must demand payment of the maker, in a reasonable time, and in case of nonpayment, give notice as in other cases to the endorser. *Perry v. Green*, 4 Harrison 61.

2. Whether parol evidence of a consent or agreement between the parties to such a note, that payment should not be demanded in a *reasonable time*, but that it should be treated as a note payable in one or more years, would be admissible. *Quare. Ib.*
3. A note payable on demand, *with interest*, endorsed by the defend-

ant, for the accommodation of the maker, and by the maker, with the consent of the endorser, given to the plaintiff as security for money borrowed, must nevertheless be treated as other negotiable paper. *Ib.*

4. *Aliter*, where the endorser takes an assignment of all the estate of the maker, or has received effects into his hands, to satisfy the debt; in such case, no demand or notice is necessary. *Ib.*
5. Payment of a note cannot be demanded on the *fourth of July*, so as to charge the endorser; but if that be the last day of grace, demand should be made on the third. *Per* Bronson J. *Sheldon v. Benham*, 4 Hill 129.
6. Where the drawee of a bill of exchange refuses to accept or pay, the drawer and endorsers are liable to the *holder* in an action on the bill. *Sydam et al. v. Westfall*, *ib.* 211.
7. After acceptance, the drawee is *prima facie* the principal debtor, the drawer and endorsers being regarded as mere sureties; and consequently no action will lie against the latter in the name of the *acceptor*. *Ib.*
8. Otherwise, where the drawee accepts and pays for the accommodation of the drawers; in which case he may recover the amount in an action for money paid to their use. *Ib.*
9. If, however, the acceptance be made with knowledge of the fact that one of the drawers signed merely as surety, he will not be liable to the acceptor; and this, whether the relation between the drawers appear on the face of the bill or not. *Ib.*
10. S., a commission merchant in the city of New York, agreed to accept drafts of N. to the amount of \$20,000, taking a bond and mortgage from him for twice that sum as security; and it was further agreed that all produce shipped to New York by N. should be sent to S. for sale on commission, that the latter should thus be kept in funds to meet his acceptances as they became due, and that he should be entitled to two and a half per cent. commission on all advances or acceptances met otherwise than with produce. N.'s drafts were afterwards accepted and paid by S. to an amount exceeding the value of the produce consigned; and he charged N. with interest on all sums thus paid, together with two and a half per cent. commission on acceptances not met with produce: Held, in an action by S. to recover the sum advanced upon one of the

drafts, that the transaction was not necessarily usurious; especially as it appeared that the charge for commission was customary among merchants engaged in similar business. Cowen J. dissented. *Ib.*

11. An accommodation endorsement made by one member of a mercantile firm without the assent, either express or implied, of his copartners, cannot be enforced against the latter, except in favour of a *bona fide* holder without notice. *Per Nelson C. J. Austin et al. v. Vandermark*, *ib.* 259.
12. N. gave L. a business note, endorsed by M., which was transferred to A. After the note fell due, M., being indebted to N., made another note for the same amount, payable to the order of and endorsed by the latter together with V. & Co., and sent it to A. as a substitute for the first note, which he desired should be returned to him: Held, that though the firm name of V. & Co. was used for M.'s accommodation, the circumstances were not sufficient to charge A. with knowledge of the fact; and that he was therefore entitled to a verdict against all the members of the firm, though the endorsement was made by one, without the knowledge or consent of the others. *Ib.*
13. A statement of a particular fund in a draft or bill of exchange, if inserted merely as a direction to the drawee how to reimburse himself, will not vitiate it. *Kelley v. The Mayor, &c., of Brooklyn*, *ib.* 263.
14. Accordingly, in an action against the city of Brooklyn by an endorsee of an instrument, signed by the mayor and countersigned by the clerk, in these words: "To the treasurer of the city of Brooklyn, at the Long Island Bank—Pay A. L. or order, fifteen hundred dollars for award No. 7, and charge to Bedford road assessment," &c.: Held that, notwithstanding the latter clause, the instrument was a negotiable bill of exchange. *Ib.*
15. In an action on a promissory note brought by one not entitled to be treated as a *bona fide* holder, the maker may defend on the ground that the note was given in consideration of land sold for the purpose of defrauding creditors; and this, though he was himself a party to the fraud. *Nellis v. Clark*, *ib.* 424.
16. B. conveyed certain lands to C. for the purpose of defrauding creditors, and took back a bond and mortgage for a part of the

purchase money. The bond and mortgage were afterwards cancelled in consideration of C.'s giving his note to one W. for a house and lot which the latter had contracted to sell to B. Before the time arrived for executing this contract, B. obtained a discharge under the insolvent act, whereupon his assignee demanded the note of W. who delivered it up to him; and, by a subsequent arrangement between B. and W., the contract between them was also given up to be cancelled: Held, in an action by one deriving title to the note under the assignee, with full knowledge of the circumstances under which it had been given, that C. was not liable. *Id.*

CHANCERY. A fact tried and decided by a court of competent jurisdiction, cannot be contested again between the same parties; and there is no difference in this respect between a verdict and judgment at common law and a decree of a court of equity. *Bank of the United States et al., v. Beverly et al.*, 1 Howard 134.

2. But an answer in chancery setting up as a defence the dismissal of a former bill filed by the same complainants, is not sufficient unless the record be exhibited. *Id.*
3. A disposition by a testator of his personal property for purposes other than the payment of his debts, with the assent of creditors, is in itself a charge on the real estate, subjecting it to the payment of the debts of the estate, although no such charge is created by the words of the will. *Id.*
4. Lapse of time is no defence where there is an unexecuted trust to pay debts which have been declared by a court to be unpaid in point of fact. *Id.*
5. It is not merely on the presumption of payment, or in analogy to the statute of limitations, that a court of chancery refuses to lend its aid to stale demands. There must be conscience, good faith, and reasonable diligence to call into action the powers of the court. *M'Knight v. Taylor*, *ib.* 161.
6. In matters of account, where they are not barred by the act of limitations, courts of equity refuse to interfere, after a considerable lapse of time, from considerations of public policy, and from the difficulty of doing entire justice, when the original transactions have become obscured by time and the evidence may be lost. *Id.*
7. A court of equity, which never is active in relief against con-

science or public convenience, has always refused its aid to stale demands, where the party has slept upon his rights for a great length of time. Nothing can call forth this court into activity but conscience, good faith, and reasonable diligence. Where these are wanting, the court is passive, and does nothing; laches and neglect are always discountenanced; and therefore from the beginning of this jurisdiction, there was always a limitation of suit in this court. *Bowman et al. v. Wathen et al.*, ib. 189.

8. Every new right of action, in equity, that accrues to a party, whatever it may be, must be acted upon, at the utmost, within twenty years. *Ib.*
9. And though the claimant may have been embarrassed by the frauds of others or distressed, it is not sufficient to take the case out of the rule. *Ib.*
10. When the complainants have long slept upon their rights, this court must remain passive and can do nothing; and this is equally true, whether they knew of an adverse possession, or through negligence and a failure to look after their interests, permitted the title of another to grow into full maturity. *Ib.*
11. Where a decree is passed by the court below against an executor, being the defendant in a chancery suit, and before an appeal is prayed the executor is removed by a court of competent jurisdiction, and an administrator *de bonis non* with the will annexed, is appointed, all further proceedings, either by execution or appeal are irregular, until the administrator be made a party to the suit. *Taylor et al. v. Savage*, ib. 282.
12. If an execution be issued before the proper parties are thus made, it is unauthorized and void, and no right of property will pass by a sale under it. *Ib.*
13. The administrator cannot obtain redress by application to this court, but must first be made a party in the court below. This may be done at the instance of either side. *Ib.*
14. After he is thus made a party, he may stay proceedings by giving bond, or the complainants may enforce the decree if the bond be not given in time. *Ib.*
15. It is not clear that a complainant, who has appealed from a decree in his favour in the hope of obtaining a larger sum, can, pending the appeal, issue execution upon the decree of the court below. *Ib.*

16. If the owner of land recognises a sale of it, although made by a person who had no authority to sell, there is a privity of contract between the owner and the purchaser, which a court of equity will enforce. *Buchannon et al. v. Upshaw*, 1 Howard 56.
17. But the owner is entitled to all the advantages of the sale thus recognised. *Ib.*
18. A perpetual injunction will be decreed in such a case to prohibit the owner of the legal title from prosecuting his ejectment. *Ib.*
19. Where the charge in the bill is substantially a fraudulent attempt to convert that into an absolute sale which was originally meant by the parties to be a security for a loan, evidence is admissible to ascertain the truth of the transaction, though the deed be absolute on its face. *Morris v. Nixon et al.*, ib. 118.
20. Where there is proof of parties meeting upon the footing of borrowing and lending, with an offer to secure the lender by a mortgage upon particular property; if a deed of the property absolute upon the face of it, be given to the lender, and the lender also take a bond from the borrower, equity will interpret the deed to be a security for money loaned, unless the lender shall show by proofs, that the borrower and himself subsequently bargained upon another footing than a loan. *Ib.*
21. Where a loan is an inducement for the execution of a deed which is absolute on the face of it, though the loan is not recited as the consideration of the deed or as any part of it, if the lender or grantee in the deed treats it subsequently as the consideration or a part of it, equity will declare the deed to be a security for money loaned. *Ib.*
22. The answer of one defendant in equity is not evidence in behalf of another defendant. *Ib.*
23. If, in equity, it is admitted or proved that one of the documents in a transaction was not intended to be what it purports, it subjects other documents in the same transaction to suspicion. *Ib.*
24. Courts of law have concurrent jurisdiction with courts of equity in cases of fraud: and will not permit a plaintiff to recover in any case, where upon the same evidence of actual or constructive fraud, a court of equity would decree against him. *Tomlin adm. Den, ex dem. Cox*, 4 Harrison 77.
25. If he who has the legal title, by his acts and conversations, in-

duces another to purchase the premises under another title, and stands by and sees him take a deed and pay his money for it, it is a fraud *per se*. *Ib.*

26. In general, courts of law will not lend their aid in enforcing injunctions from chancery; nor will they ordinarily take any notice of such writs, in the course of proceedings at law. *Per Nelson, C. J. Kelley & Marcy v. Cowing*, 4 Hill 266.
27. H. having made a voluntary assignment of all his effects for the benefit of creditors, an injunction was obtained on a bill filed against him and the assignees restraining them from collecting or receiving any debts due to H.; after which, C., with full knowledge of the injunction, paid to the assignees the amount of a note given them for an account which H. had against him.: Held, in an action on the note by one to whom it was transferred after it became due, that the payment to the assignees constituted a good defence. *Ib.*
28. Where several devisees are bound to contribute equally, or rateably, towards the satisfaction of a debt due from the testator or intestate, if the creditor recovers a judgment against a part of such devisees or heirs for his whole debt, which judgment is a lien upon lands sufficient to satisfy the portion of the debt which the defendants in such judgment are equitably bound to pay, and then suffers his judgment to lie until the defendants therein have disposed of the property on which it was a lien and such lien is extinguished, the other heirs or devisees or their property, are not liable in equity to pay the creditor his whole debt, but only their rateable proportions thereof. *Schermerhorn v. Barkdyt*, 9 Paige 28.
29. Where the parties to a contract, for the sale and purchase of iron, intended to contract for a certain number of tons gross weight, at a specified price by the ton, but in reducing the contract to writing the term tons only was used, without any thing appearing upon the face of the contract to show that any other than statute tons of 2000 pounds avoirdupois were intended: Held, that in a suit at law upon the contract, the parties would be precluded from showing that tons gross weight were intended; and that the party injured by the mistake might therefore file a bill in chancery to reform the written contract so as to make it conform to the actual understanding and intent of the parties to the same. *Many v. Beekman Iron Company*, *ib.* 183.

30. Where the officers or agents of a corporation are made parties to a bill filed against the corporation, for the purpose of compelling an answer upon oath, and the complainant by mistake inserts a prayer for relief against such officers as well as against the company, the officers cannot demur to the discovery and relief generally. But they should make the discovery sought and demur to the relief; or should answer the bill generally, and then object, at the hearing, that they had been improperly made parties to the suit for relief as well as for discovery. *Ib.*
31. The case of officers and agents of a corporation is an exception to the general rule that a person who has no interest in the subject matter of the litigation, and who is a mere witness, cannot be made a defendant in a bill in chancery. But they can only be made parties for discovery, where relief is sought against the corporation; and not where the whole relief claimed is against persons other than the corporation. *Ib.*
32. Where the officers or agents of a corporation are made parties to a bill in chancery, for the purpose of obtaining a discovery of facts within their knowledge as such officers or agents, it is not necessary for the complainant to show in his bill that they alone are acquainted with the facts as to which an answer is sought. It is sufficient if it appears that the facts charged in the bill are material to the relief sought against the corporation, and are known to the officers or agents as such; especially if the discovery relates to transactions with them and in that character. *Ib.*
33. Praying relief against some of the defendants in a suit as to whom the complainant is not entitled to relief but to a discovery merely, does not render a bill multifarious. *Ib.*
34. Where a demurrer to a bill is accompanied by an answer, although such answer merely denies combination, and the demurrer is overruled, if the complainant wants a further answer he must file exceptions to the answer already put in. *Ib.*
35. The court of chancery may decree the specific performance of a contract for the sale of lands lying in another state, where the party who is to make the conveyance is within the jurisdiction of the court, and has been served with process. *Sutphen v. Fowler*, *ib.* 280.
36. And where the defendant in such a suit is an infant, the proper

decree is that he convey the legal title to the premises when he arrives at the proper age to enable him to do so, according to the laws of the state where the property is situated; and that in the meantime the vendee be permitted to receive and retain the possession of the property. *Ib.*

37. The courts of common law have no authority to take testimony, upon a commission issued for that purpose, except such authority as is conferred upon those courts by statute; and in taking such testimony the regulations prescribed by the legislature must be strictly complied with. *Brown v. Southworth*, *ib.* 351.
38. But the court of chancery, independent of any statutory authority, has always possessed the power to issue a commission for the examination of witnesses, either in or out of the state, and to direct the manner in which the commission shall be returned. *Ib.*
39. And the manner of executing and returning commissions to take testimony in the court of chancery, is regulated by the rules and practice of the court, and not by any statutory provision, except as to the right of parties and their counsel to be present and to examine and cross-examine the witnesses orally. *Ib.*
40. By the settled practice of the court of chancery, a commission for the examination of witnesses, in suits pending in that court, may be returned by the commissioners by mail, directed to the proper officer of the court with whom the depositions are to be filed, unless the court has made a special order for the return of the commission in a different manner. *Ib.*
41. The commissioners, after taking the testimony of witnesses under a commission, should enclose the commission and the depositions under their seals, and should severally write their names upon the outside of the envelope. But a mere irregularity of the commissioners, in suffering one of their number to write the names of all the commissioners upon the envelope, through mistake or inadvertence, where there is no doubt as to the genuineness of the depositions, and that they have not been altered since they were taken and certified by the commissioners, will not prevent the court from receiving the testimony. *Ib.*
42. Where by mistake the witness intended to be examined under a commission was not rightly named therein, but the commissioners notwithstanding such mistake, examined the witness upon the inter-

rogatories annexed to the commission: Held, that the deposition was extrajudicial and could not be received as evidence in the suit. *Ib.* 352.

43. The article of the revised statutes relative to taking the testimony of witnesses out of the state, only applies to the taking of such testimony in actions brought in courts of common law. *Ib.*

CHOSE IN ACTION. A mere *jus precarium*, or right resting in courtesy—e. g. an anticipated donation from government—is not assignable. *Per* Cowen J. *Munsell v. Lewis*, 4 Hill 635.

2. L. and W., having contracted with the canal commissioners to construct certain bridges on the Chenango canal by the 15th of October, 1836, and having commenced the work, agreed with M. that he should go on and complete it at his own expense, and be entitled to receive from the canal commissioners the compensation provided for in the original contract. The work was accordingly completed by M., and he received his pay. Afterwards, an award was made in favour of L. and W. on account of the original contract, pursuant to an act passed in April, 1836, providing for extra allowances to contractors on the Chenango canal, (*Sess. L.* '36, p. 201,) and one half the sum awarded was paid over to L.: Held, in an action against him by M. to recover the money thus received, that the latter had no right to it. Nelson C. J. dissented. *Ib.*

CONSTITUTIONAL LAW. A person in custody under a *capias ad satisfaciendum* issued under the authority of the circuit court of the United States, cannot legally be discharged from imprisonment by a state officer, acting under a state insolvent law. *Duncan v. Durst et al.*, 1 Howard 301.

2. A state law, passed subsequently to the execution of a mortgage, which declares that the equitable estate of the mortgagor shall not be extinguished for twelve months after a sale under a decree in chancery, and which prevents any sale, unless two-thirds of the amount at which the property has been valued by appraisers shall be bid therefor, is within the clause of the tenth section of the first article of the constitution of the United States, which prohibits a state from passing a law impairing the obligation of contracts. *Bronson v. Kinzie et al.*, *ib.* 311.

Per Taney C. J. "Undoubtedly a state may regulate at pleasure the modes of proceeding in its courts in relation to past con-

tracts as well as future. It may, for example, shorten the period of time within which claims shall be barred by the statute of limitations. It may, if it thinks proper, direct that the necessary implements of agriculture, or the tools of the mechanic, or articles of necessity in household furniture, shall, like wearing apparel, not be liable to execution on judgments. Regulations of this description have always been considered in every civilized community as properly belonging to the remedy, to be exercised or not by every sovereignty according to its own views of policy and humanity. It must reside in every state to enable it to secure its citizens from unjust and harassing litigation, and to protect them in those pursuits which are necessary to the existence and well being of every community. And although a new remedy may be deemed less convenient than the old one, and may in some degree render the recovery of debts more tardy and difficult, yet it will not follow that the law is unconstitutional. Whatever belongs merely to the remedy may be altered according to the will of the state, provided the alteration does not impair the obligation of the contract. But if that effect is produced, it is immaterial whether it is done by acting on the remedy or directly on the contract itself. In either case it is prohibited by the constitution." "It is difficult, perhaps, to draw a line that would be applicable in all cases between legitimate alterations of the remedy, and provisions which, in the form of remedy, impair the right. But it is manifest that the obligation of the contract and the rights of a party under it, may in effect be destroyed by denying a remedy altogether; or may be seriously impaired by burdening the proceedings with new conditions and restrictions, so as to make the remedy hardly worth pursuing. And no one, we presume, would say that there is any substantial difference between a retrospective law declaring a particular contract or class of contracts to be abrogated and void, and one which took away all remedy to enforce them, or encumbered it with conditions that rendered it useless or impracticable to pursue it." *Ib.*

3. The statute authorizing a private road to be laid out over the lands of a person, without his consent, is unconstitutional and void. (Nelson C. J. dissented.) *Taylor v. Porter*, 4 Hill 140.
4. The legislature can only exercise such powers as have been delegated to it, and when it transcends these limits, its acts are utterly void. *Per* Bronson J. *Ib.*

5. The phrase *law of the land*, in the constitution, imports a suit, trial, and judgment according to the course of the common law, or in the established and usual mode of contesting individual rights. *Ib.*

6. Private property cannot be taken for *public use*, without making just compensation to the owner. *Ib.*

CONTRACT. It is a general rule that courts will not aid either party in enforcing an illegal *executory* contract; nor, if *executed*, will they aid either party in setting it aside, or in recovering back what has passed under it. *Nellis v. Clark*, *ib.* 424.

2. An agreement for stipulated damages, for the breach of a contract, necessarily implies that such damages are to be received in satisfaction of, and as a full compensation for, the breach of the agreement to which such stipulation applies. *Shiell v. M'Nitt*, 9 Paige 102.

CONTRIBUTION. The principle that lands consisting of different parcels, subject to a general incumbrance, are in equity to be charged in the inverse order of the alienation of the several parcels, applies to cases where the owner of the lands has given thereon several mortgages of different dates. *Schryver v. Teller*, *ib.* 173.

2. A general lien will be thrown upon such particular parcel of land as will give a mortgagee the benefit of the priority of his mortgage upon the lands of the mortgagor, or upon a part thereof, over subsequent incumbrances, either upon the whole premises or upon a part thereof. *Ib.*

CORPORATION. A municipal corporation may issue negotiable paper for a debt contracted in the course of its proper business; and no provision in its charter or elsewhere, merely directing a certain form in affirmative words, should be construed as taking away this power. *Per Cowen J. Kelley v. Mayor &c. of Brooklyn*, 4 Hill 263.

2. The same rule applies to all corporations, whether public or private. *Per Cowen J. Ib.*

3. Where the charter of a municipal corporation provided that all moneys should be drawn from the treasury in pursuance of an order of the common council, signed by the mayor &c.: Held, that a negotiable draft on the treasury, signed in the manner

- directed, but issued on the basis of a mere note or memorandum in the corporation minutes, without a formal order having been entered, was a sufficient compliance with the charter; it appearing that this was the accustomed mode of drawing moneys. *Ib.*
4. The corporation will not be discharged from liability on such draft by the omission of the holder to make presentment to the treasurer and give notice, provided it be shown that it neither has suffered nor can suffer from the omission. *Ib.*
 5. In a contract made by the agents of a corporation, not under seal, it is sufficient to bind the corporation if it appears upon the contract that the agents who signed it intended to contract for the corporation, as such agents, and not for themselves as individuals. *Mary v. Beekman Iron Company*, 9 Paige 188.
 6. A corporation which is not prohibited by law from doing so, and without any express power in its charter for that purpose, may make a negotiable promissory note, payable either at a future day or upon demand, where such note is in fact made or given for any of the legitimate purposes for which the company was incorporated. *Attorney General v. Life and Fire Insurance Company*, ib. 470.
 7. A corporation may be bound by the acts of its agents, although such acts have not been authorized by a deed or power in writing under its corporate seal, or even by a written instrument not under seal, except in cases where by the statute of frauds or otherwise the contract, if made by a natural person, must be reduced to writing to be valid. *American Insurance Company v. Oakley*, ib. 497.
 8. The acts and assent of corporations, like those of individuals, may be inferred from other facts and circumstances although such acts or assent are not evidenced by writing. *Ib.*
 9. Where the president of a corporation authorizes an attorney or solicitor to prosecute or defend a suit, or to commence any legal proceeding in which the corporation is interested, the attorney or solicitor will be authorized to appear for the corporation, and such corporation will be bound by his acts as their attorney or solicitor. And if the president exceed his authority in retaining such attorney or solicitor, the corporation must look to him for any damages sustained in consequence of such unauthorized act. *Ib.*
- COVENANT. A covenant was entered into between S. and T. of

the one part and B. of the other, wherein S., who owned certain lands, agreed to sell them *'to the best advantage he could obtain for them in cash between the date of the covenant and the first of October then next, and pay the proceeds to B., within the time mentioned, to apply on a mortgage executed to him by S.;* after which followed this clause—"Now therefore we agree that the said moneys so received as aforesaid shall be paid to said B. &c., and that said S. shall use all necessary care and diligence in the sale of said lots:" Held, an undertaking by S. and T. that, among other things, S. should use all necessary care and diligence *to make sales* within the time specified, and that he should use the like care and diligence to sell to the *best advantage* or for the *best price* which could be obtained within the same period. *Brown v. Stebbins*, 4 Hill 154.

2. As a general rule, it is sufficient, in assigning a breach, to follow and negative the words of the covenant. *Ib.*
3. An exception to the rule obtains where this mode of pleading does not necessarily amount to a breach. *Per Bronson J. Ib.*
4. When the pleader undertakes to assign a breach coming within the substance, effect, or intent of the covenant, he is held to a more strict rule than when he follows either negatively or affirmatively, as the case may be, the words of the contract. *Ib.*
5. In order to maintain an action on a covenant of warranty or for quiet enjoyment in a deed of lands, a lawful eviction in some form must be shown. *Greenvault v. Davis*, ib. 643.
6. The eviction, however, need not be by *process of law*; but it is enough that, on a valid claim being made by a third person under title paramount, the plaintiff voluntarily yielded up the possession. *Ib.*
7. Where the plaintiff thus surrenders possession without a legal contest, he assumes the burden of proving that the person entering had title paramount. *Ib.*
8. As a general rule, the consideration clause in a deed of lands is open to explanation by parol proof. *Ib.*
9. But in an action on a covenant of warranty brought by one to whom the grantee in the deed had conveyed: Held, that the grantor was not at liberty to show the consideration paid for the land to be less than the sum expressed in the deed. *Ib.*

DEBTOR AND CREDITOR. Where two persons who were copartners assigned all their partnership property and effects to trustees to pay the creditors of the firm, giving preferences to certain classes of the creditors, and directed the surplus of the assigned property to be paid to the assignors, and one of the copartners afterwards made an assignment of all his property and effects to a trustee, to be applied in the first place to the payment of his individual creditors, and the residue, if any, to be applied to the payment of such of the partnership debts as were not included in the first class of debts provided for in the previous assignment: Held, that the assignment of the copartnership effects was valid as against the creditors of the firm, even if there were individual creditors of the assignees at the time of making the assignment. *Bogert v. Haight*, 9 Paige 297.

2. An assignment of copartnership property to trustees, for the payment of all the debts of the firm, which assignment directs the surplus, if any, to be paid over to the assignors, is not necessarily fraudulent as to individual creditors of the different members of the firm. *Ib.*
3. Where an assignment is not fraudulent upon its face, a charge in the bill that the complainant is informed, and believes that the assignment was made for the purpose of defrauding the creditors of the assignor, which charge is not verified by the oath of any person who has any personal knowledge of the alleged fraud, is not sufficient to entitle the complainant to an injunction against the assignees. *Ib.*

DISTRESS. Goods of a mere *under-tenant* which have been removed from the demised premises before any rent became due, are not liable to be distrained for subsequently accruing rent. *Acker v. Witherell*, 4 Hill 112.

2. Otherwise, if the goods belong to one who occupied as *assignee* of the original tenant. *Ib.*
3. The fact of demised premises being found in the possession of one not named in the lease, raises the presumption that he is in as *assignee* of the lessee and not as *under-tenant*; especially if it appear that he has paid rent to the original landlord. *Ib.*

EJECTMENT. In an action of ejectment, if the plaintiff count upon a lease to himself from a person whom the evidence shows to have

been dead at the time, it is bad. *Connor v. Bradley and Wife*, 1 Howard 211.

2. It is a settled rule at common law, that where a right of re-entry is claimed on the ground of forfeiture for nonpayment of rent, there must be proof of a demand of the precise sum due at a convenient time before sun-set on the day when the rent is due upon the land, in the most notorious place of it, even though there be no person on the land to pay. *Ib.*
3. In proceeding under the statute of 4 Geo. 2, it must be alleged and proved that there was no sufficient distress upon the premises on some day or period between the time at which the rent fell due, and the day of the demise; and if the time when, according to the proofs, there was not a sufficient distress upon the premises, be subsequent to the day of the demise, it is bad. *Ib.*

EVIDENCE. Extrinsic evidence may be resorted to for the purpose of ascertaining the true import of a letter of guarantee, and its construction is matter of law for the court. *Bell and Grant v. Bruen*, ib. 169.

2. "By the statute of frauds such agreement must be in writing, and signed by the party to be charged: it cannot be added to by verbal evidence, nor by written either, if not signed by the guarantor, unless the written evidence is, by a reference in the letter, adopted as part of it. But as the statute does not prescribe the form of a binding agreement, it is sufficient that the natural parts of it appear either expressed or clearly to be implied: and correspondence and other evidence may be used to ascertain the true import and application of the agreement; by the aid of which extrinsic evidence, the proper construction may be made." *Per Catron J. Ib.*
3. The declarations of a deceased member of a family that the parents of it never were married, are admissible in evidence, whether his connection with that family was by blood or marriage. *Jewell's Lessee v. Jewell*, ib. 338.
4. The acts and declarations of the parties being given in evidence on both sides, on the question of marriage, an advertisement announcing their separation, and appearing in the principal commercial newspaper of the place of their residence immediately after their separation, is part of the *res gestæ*, and admissible in evidence.

Whether or not it was inserted by the party, and if it was, what were his motives, are questions of fact for the jury. *Ib.*

5. If a written contract between the parties be offered in evidence, the purport of which is to show that the parties lived together on another basis than marriage, and the opposite party either denies the authenticity of the paper, or alleges that it was obtained by fraud; the question whether there was a marriage or not is still open to the jury upon the whole of the evidence. *Ib.*
6. It is legal evidence that the president specially authorized and directed, in writing, the secretary of the treasury to make advances of public money, and that such paper was destroyed when the treasury building was burned. It is sufficient, if the witness states his belief that it was so destroyed. *Williams v. United States*, ib. 290.
7. The dockets and records of a court, showing that money had been received by the marshal or his deputies, under executions, are evidence in a suit against his securities. *Ib.*
8. Upon a question of boundary, the acts and declarations of one under whom the party claims, is competent evidence, if such acts were done or declarations made while he was in possession as owner. *Tomlin adm. Den, ex dem. Cox*, 4 Harrison 77.
9. A written instrument acknowledging the receipt of a quantity of wheat "in store," imports a *bailment* and not a *sale*. *Goodyear v. Ogden & Pearl*, 4 Hill 104.
10. Such instrument is in the nature of a contract, and therefore not open to *contradiction* in the sense of the rule applicable to receipts proper; though its import may be *explained* by parol evidence of the usage among dealers in wheat. *Per Cowen J. Ib.*
11. Where parol evidence is given of a usage to treat such instruments as importing a sale, it is for the jury to say whether the usage be so universal and well known as to raise the presumption that it entered into and formed a part of the contract in question. *Ib.*
12. If a person covenant for the results or consequences of a suit between others, the decree or judgment in such suit will be evidence against him, though he was not a party. *Rapelye & Purdy v. Prince & Prince*, ib. 119.
13. Accordingly, where one assigned a mortgage, covenanting that it should produce and yield a given sum over and above the costs of

- foreclosing, and that if it did not he would pay the deficiency: Held, that the assignee having subsequently foreclosed the mortgage in chancery, and sold under the decree, without making the assignor a party, these proceedings were evidence against the latter, in an action on the covenant, to show the amount of the deficiency. *Ib.*
14. The memorandum of a deceased teller of a bank, made in the usual course of his employment, is competent evidence in proving a demand by him on the maker of a note, and notice to the endorser; and this, whether he attended to the business on the retainer of a notary, or as part of his duty to the bank. *Sheldon v. Benham*, *ib.* 129.
15. Before a witness' competency can be deemed to have been restored by a release, something more than a constructive delivery of the release—i. e. a delivery to a third person for the use of the witness—must be shown. It should at least appear that he knew of the release at the time of giving his testimony. *Seymour v. Strong*, *ib.* 255.
16. A witness, *prima facie* interested, having been examined under a commission, it was shown at the trial that the commission, together with a release of the witness' interest, were enclosed to the commissioner in one wrapper, accompanied by directions to deliver the release to the witness before swearing him; and that the release was afterwards annexed to the commission and returned with it: Held, sufficient evidence of the delivery of the release to authorize the deposition to be read. *Ib.*
17. In actions *ex contractu*, a separate verdict in favour of one of several defendants, though grounded on his discharge as a bankrupt, will not render him competent to testify for his co-defendants. *Mills v. Lee*, *ib.* 549.
18. Where a gentleman introduced a female who was previously living with him as a house keeper, to his friends as his wife, and from that time for the period of eleven years continued to cohabit with her as his wife, holding her out to the world as sustaining that relation to him, and had several children by her who were called by his name: Held, that these facts were sufficient to authorize a court or jury to presume an actual marriage between the parties, by a contract in presenti, at the commencement of such matrimonial cohabitation. *In the matter of Taylor*, 9 Page 611.

19. The acts and declarations of a man and woman and other attending circumstances, during their cohabitation together, being part of the *res gesta*, are proper evidence to show the character of their intercourse; whether it was matrimonial or meretricious. *Ib.*

20. But general reputation as to the character of such intercourse, after it had ceased, or the declarations and admissions of the parties made subsequent to that time, are not legal evidence to rebut the presumption of an actual marriage arising from such cohabitation and other acts, and to establish the fact that their children are illegitimate. *Ib.*

EXECUTION. A sheriff after having levied on goods and chattels, is presumed in law to have the possession or custody of them, and he must take care of them at his peril. *Cumberland Bank v. Hann*, 4 Harrison 166.

2. He may leave them in the actual possession of the defendant until the day of sale, and in such case, the law will consider the defendant as his agent or bailiff: but it will be at the risk of the sheriff as between him and the plaintiff, in case the goods are wasted, lost or destroyed. *Ib.*

3. Goods so left by the sheriff, acting in good faith, would not be liable to seizure on a subsequent execution, so as to avoid the first levy. *Ib.*

4. The sheriff may so leave the goods by the direction or consent of the plaintiff and at the plaintiff's risk, as to waste, loss or destruction, without thereby losing his legal custody of them, or the plaintiff's priority, if done in good faith. *Ib.*

5. The plaintiff may wait on the sheriff, as long as the sheriff chooses to indulge the defendant: or may consent to, or direct, reasonable adjournments, without thereby losing his priority, if done in good faith. *Ib.*

6. The plaintiff, when he delivers his execution to the sheriff, or afterwards, may direct the sheriff not to proceed to a sale, without further orders from him, or unless urged on by younger executions, without thereby losing his priority, if done in good faith. *Ib.*

7. But if defendant is permitted with the knowledge and consent, express or implied, of the plaintiff, not only to use, but to exercise an unlimited control and dominion over all the property levied on, selling, consuming or disposing of it as his own, it is evidence of

a fraudulent and colourable use of the execution, so as to let in a younger execution prosecuted in good faith. *Ib.*

8. It is not necessary to prove actual fraud in the concoction of the judgment: nor an actual deliberate intention to defeat, hinder or delay other creditors. A man may lose his rights, as well by negligence and a disregard of the rights of others, as by positive fraud or malfeasance. *Ib.*
9. The outer door of a dwelling-house being *latched* merely, the sheriff entered it, contrary to the known will of the owner, and levied upon his goods therein by virtue of a *f. fa.*: Held illegal, though the owner was not in the house at the time; and that the levy gave the sheriff no right to remove the goods.

Held, further, that even a guest in the house might lawfully resist the sheriff's attempt to remove goods thus seised, using no more force than was necessary. *Curtis v. Hubbard*, 4 Hill 437.

EXECUTORS AND ADMINISTRATORS. Where two executors and trustees under a power contained in the will, sold a part of the real estate of the testator, and took back a bond and mortgage for the purchase money payable to such executors and trustees jointly, and one of them afterwards, without the knowledge or consent of the other, and when the money was not wanted for the purposes of the trust, sold and assigned such bond and mortgage, and misapplied the proceeds of such sale and failed, being largely indebted to the estate: Held, that such sale and assignment of the bond and mortgage by one of the executors and trustees only was unauthorized, and that the assignee acquired no title to the bond and mortgage under such assignment; and that he was only entitled in equity to be protected so far as the purchase money paid by him therefor was actually applied to the purposes of the trust, or was afterwards recovered out of the securities which had been taken for a portion of such purchase money by the executor and trustee who had been guilty of the breach of trust. *Hertell v. Bogert*, 9 Paige 52.

2. Two or more executors are regarded in law as one person, and if one of them sells the goods or the securities of the testator, for money, to a bona fide purchaser, who has no reason to suppose such executor intends to commit a breach of trust, such purchaser will hold the property, or securities, not only as against the other

- executors, but also as against creditors and legatees; he having by such purchase obtained the legal title thereto. *Ib.*
3. But where a note, or other security, is given to two or more executors jointly, after the death of the testator, the legal title is in all the executors, in the same manner as if it had been given to them as trustees under an ordinary trust; and the concurrence of all of them is necessary to transfer the legal title to such note or security, to a purchaser thereof. *Ib.*
 4. It is a principle of equity that where one of two innocent persons must suffer by the wrongful act of a third party, the one who by his negligence has enabled such third party to do the injury, must himself bear the loss occasioned thereby. *Ib.*
 5. If an executor, in distributing an estate, assigns to one of the distributees a mortgage which is for a greater amount than his share, the distributee is not bound to make up the difference in case the mortgaged property sells for less than the amount of the mortgage. *Hammond's Adm. v. Lewis, Ex. of Washington*, 1 Howard 14.
 6. A disposition by a testator of his personal property to purposes other than the payment of his debts, with the assent of creditors, is in itself a charge on the real estate, subjecting it to the payment of the debts of the estate, although no such charge is created by the words of the will. *Bank of the United States and others v. Beverly*, ib. 134.
 7. Where an executor is liable to be called upon at any time for the payment of a legacy, and there are no directions in the will to put it out at interest, he is not chargeable with interest thereon, unless it is made to appear that he has used the money in trade, or by loan, or had mingled it with, or used it in common with his own. *Lake Adm. v. Parke Ex.*, 4 Harrison 108.
 8. Goods and chattels, on the death of the owner, vest in his personal representative; and if they be afterwards tortiously taken or wrongfully converted, he may sue for them in his own name without describing himself as executor or administrator. *Patchen v. Wilson*, 4 Hill 57.
 9. Otherwise, where the executor or administrator sues on a contract made with the testator or intestate. In such case, unless the contract be a promissory note payable to bearer, the action must be prosecuted by the representative as such; and this, though the

time for payment or performance had not arrived when the testator or intestate died. *Ib.*

10. D., by his will, gave the rents and profits of two-thirds of his real estate to his daughters for life, the fee to their issue; and the fee of the other third to his grandsons, to take at twenty-one, with the benefit of the income by way of maintenance during their minority. The will then provided as follows: "For the more easy and equal division of my estate, I do hereby fully authorize and empower my executors hereinafter named, whenever they shall think it expedient, to sell and dispose of all or any part of my real estate for the most moneys that can be gotten for the same," &c. In pursuance of this authority, the two acting executors sold certain lots of land, parcel of D.'s estate, and took back a bond and mortgage in their joint names as executors for a portion of the purchase money. Afterwards, and prior to the fund being wanted for distribution, one of the executors sold and assigned the bond and mortgage to B., misapplied the proceeds and failed: Held, that though the other executor did not unite in or assent to the assignment, B. acquired a valid title to the bond and mortgage, he having purchased in good faith. *Bogert v. Hertell*, ib. 492.
 11. If an executor in suing for debts supposed to be due to the estate, brings a suit in good faith, under the advice of counsel, and in a manner which is apparently for the benefit of the estate, he will not be subjected to personal loss, although the result shows that a different mode of proceeding would have been more beneficial to the parties interested in the estate. *Collins v. Hoxie*, 9 Paige 81.
 12. Where an executor, instead of calling in the money upon good and collectable bonds and mortgages or other securities belonging to the estate of the testator, for the benefit of the legatees, transfers such securities to a third person for the use of such legatees, with their assent, he is entitled to the same commissions as if he had actually received and paid over the money, or invested it as directed by the will. *Cairns v. Chaubert*, ib. 160.
 13. But where an executor dies before he has converted the personal property of the testator, into money, or otherwise disposed of it in the execution of his trust, he is not entitled to commissions upon the value of such property. *Ib.*
- FALSE PRETENCES.** A representation, though false, is not within the statute against obtaining property &c. by false pre-

tences, unless calculated to mislead persons of *ordinary prudence and caution*. *The People v. Williams*, 4 Hill 9.

2. Accordingly, where an indictment charged the defendant with obtaining V.'s signature to a deed of lands, by falsely pretending that G., who held a bond and mortgage against F., was about to sue him on the bond, foreclose the mortgage &c., and that G. had so told the defendant: Held, that the pretences set forth were not sufficient to warrant a conviction. *Ib.*

FRAUD. Where the defrauded party, with full knowledge of the fraud, settles the matter in relation to which such fraud has been committed and releases the person who defrauded him, he has no claim to relief, either at law or in equity, on account of such fraud. *Parsons v. Hughes*, 9 Paige 591.

2. If a partnership is defrauded by a third person, with the consent and connivance of one of the copartners, it seems that a settlement and discharge of such copartner, by the other members of the firm, from all claim on account of such fraud, is a bar to any relief against the other party to the fraud. *Ib.*

FRAUDS, STATUTE OF. The statute of frauds relating to promises to answer for the debt, default, or miscarriage of another, applies only where the promisor stands in the relation of a surety for some third person who is the principal debtor. *Per* Bronson J. *Johnson v. Gilbert*, 4 Hill 178.

2. Accordingly, in an action on a written promise to guaranty the payment of a chattel note, it appearing that the defendant transferred the note to the plaintiff and made the guaranty in consideration of moneys paid by the plaintiff for the defendant at his request: Held, that the promise was valid, though it expressed no consideration. *Ib.*

GUARANTEE. Commercial letters are not to be construed upon the same principles as bonds, but ought to receive a fair and reasonable interpretation according to the true import of the terms, to what is fairly to be presumed to have been the understanding of the parties; and the presumption is to be ascertained from the facts and circumstances accompanying the entire transaction. *Bell & Grant v. Bruen*, 1 Howard 169.

2. A written guaranty is to be construed by the same rules, and may be explained by the same evidence as other contracts. *Per* Cowen J. *Walrath v. Thompson*, 4 Hill 200.

3. Where the guaranty was in the form of a letter from the defendant to the plaintiff, thus: "As there was no time set for the payment of *your account*, and Mr. J. thought it would be an accommodation to him to have you wait until &c.; if that will answer your purpose, I will be surety for the payment" &c.: Held, that the words *your account* were ambiguous, and that parol evidence was admissible for the purpose of applying them to an account of J. not existing when the letter was written, but contracted afterwards on the faith of it. *Ib.*
4. Had the guaranty related to a precedent account of J. with the plaintiff, it would have been within the statute of frauds, and void for not expressing a consideration. *Per Cowen J. Ib.*
5. Independently of oral explanation, the words of a guaranty must be construed most strongly against the guarantor. *Ib.*

HUSBAND AND WIFE. Where the wife pledges her separate estate, or her reversionary interest in her real property, for the debt of her husband, she is entitled to the ordinary rights and privileges of a surety. *Hawley v. Bradford*, 9 Paige 200.

2. But where a wife joins her husband in a mortgage of his real estate, she is not entitled to have the mortgage satisfied out of the husband's interest in the premises exclusively; so as to give her dower in the whole premises notwithstanding the mortgage, and not in the equity of redemption merely. *Ib.*
3. Thus, where the mortgaged premises are sold under the mortgage, the wife is only entitled to be endowed of the surplus which remains after payment of the mortgage debt and costs of foreclosure. *Ib.*
4. But she is entitled to the value of her dower in such surplus free from any charge for costs, as between her and the creditors of her husband. *Ib.*
5. Where debts are due to the wife at the time of her marriage, they belong to her, in case she survives her husband, although he may have brought a suit for such debts in their joint names, and recovered a judgment therefor; if the money had not been actually collected by him in his lifetime. *Searing v. Searing*, *ib.* 283..
6. But where the husband receives a debt which was due to the wife at the time of her marriage, or novates the debt by taking a new security for the same, in his own name, his wife's right of survivorship is at an end; and the new security taken by the husband belongs to his personal representatives. *Ib.*

7. Where it is necessary to bring a suit for the recovery of money in the name of the husband and wife jointly during coverture, the cause of action survives to the wife for her own benefit, if the husband dies first. *Ib.*
8. And it seems that where the husband takes a new security, in the name of his wife, for a debt due to her at the time of the marriage, it is not such a reducing of the debt into possession by him as to deprive his wife of the right to such new security by survivorship. *Ib.*
9. If a security is given to the wife during coverture, the husband may sue upon the contract in his own name, or he may bring a suit thereon in the names of himself and wife jointly, at his election. *Ib.*
10. Where the husband permitted his wife to receive moneys due to her before coverture, and to reloan them upon securities in her own name, and also agreed, upon her joining in a conveyance of his real estate so as to release her inchoate right of dower therein, that a certain portion of the proceeds of the sale might be received and loaned by her upon securities in her own name, which was done accordingly: Held, that the securities thus taken belonged to the wife, who survived him; and that she was not bound to account for them as the administratrix of her deceased husband. *Ib.*
11. Where personal chattels are bequeathed to a feme covert for her separate use, or to a single woman free from the control of her future husband, the court of chancery will protect her interest therein, against the creditors of her husband, although no trustee is named in the will of the testator to hold them for her separate use. *Skirley v. Skirley*, ib. 363.
12. But where chattels are bequeathed to a feme covert generally, or without any restriction, and have been reduced to possession by the husband, with her consent, they become his property in equity as well as at law, and may be taken in execution for his debts. *Ib.*
13. If a feme covert, who has a separate estate, purchases articles of furniture with the rents and profits of such estate and puts them into the possession of her husband, without any agreement or understanding with him that he shall hold them as her trustee, or that the title shall be vested in any other person for her separate use, the articles thus purchased become the property of her husband, and are liable to be sold for his debts. *Ib.*

INSURANCE. At common law, the assignee of a policy of insurance cannot sue upon it in his own name. *Mass v. The Herkimer County Mutual Insurance Company*, 4 Hill 187.

2. Where, however, the charter of an insurance company provided that, in case of an alienation of the property insured by sale or otherwise, the policy should be void, but that the grantee or alienee, having the policy assigned to him, might have the same ratified and confirmed for his use, by the consent of the company, within thirty days next after such alienation; and that this should entitle him to all the rights and privileges of the party originally insured: Held, that a ratification and confirmation pursuant to the charter, gave the assignee the right to sue upon the policy in his own name; and that no action would lie in the name of the assignor. *Ib.*

3. Where the insured, on applying for insurance upon a building against fire, promised the underwriters verbally that if they accepted the risk he would discontinue the use of a fire-place in the basement, and use a stove instead thereof; but, after obtaining the policy, omitted to perform his promise, in consequence of which the building was burned: Held, no defence to an action on the policy. *Alston v. The Mechanics' Mutual Insurance Company of Troy*, ib. 329.

INSURANCE OF LIVES. A provision in a life-policy that it is to be deemed void in case the assured shall "*die by his own hand*," imports a *death by suicide*; i. e. an act of criminal self-destruction. *Breasted v. The Farmers' Loan and Trust Company*, ib. 78.

2. Accordingly, in an action on such policy the underwriters will be liable though it appear that the assured *drowned himself*, provided the act was done in *a fit of insanity*. *Ib.*

INTEREST. In the settlement of an account between the owner of land and the holder, interest begins to run against the latter from the time when the owner asserted his title to the land. *Buchannon and others v. Upshaw*, 1 Howard 56.

JUDGMENT. Where an administrator found among the papers of the decedent certain promissory notes which had been given to him in his lifetime, and supposing them to be justly and legally due, called upon the maker of the notes for payment, who voluntarily confessed a judgment for the amount; and subsequently

mortgaged his real estate, upon which such judgment was a lien, to his father : Held, that the mortgagee could not impeach the consideration of the judgment, by showing that the notes upon which it was founded were given upon a sale of tickets in a lottery not authorized by law, and contrary to the statute. *Shufelt v. Shufelt*, 9 Paige 137.

2. Where a person apparently indebted to the estate of a deceased creditor, upon being called upon for payment, voluntarily confesses a judgment for the debt to the personal representative of the supposed creditor, without apprising him that the demand is illegal, the defendant in the judgment, and those claiming under him subsequent thereto, are estopped from denying the validity of such judgment. *Ib.*

JURY. In case of a collision of vessels, the question, by whose fault the accident happened, is a question of fact for the jury to decide upon the whole of the evidence. *Smith and others v. Condry*, 1 Howard 28.

2. Extrinsic evidence may be used to ascertain the true import of an agreement of guarantee, and its construction is matter of law for the court. *Bell and Grant v. Bruen*, *ib.* 169.
3. An advertisement, announcing the separation of persons who had been living together as man and wife, being allowed to be given in evidence under the circumstances of the case, the questions whether or not it was inserted by the party, and if so, what were his motives, are questions of fact for the jury. *Jewell's Lessee v. Jewell*, *ib.* 219.
4. If a written contract between the parties be offered in evidence, the purport of which is to show that the parties lived together on another basis than marriage, and the opposite party either denies the authenticity of the paper, or alleges that it was obtained by fraud, the question whether there was a marriage or not is still open to the jury upon the whole of the evidence. *Ib.*

LANDLORD AND TENANT. Where a landlord elects to proceed at law against his tenant to enforce a forfeiture of the lease for the non-performance of its conditions, he cannot, during the pendency of the suit at law against the tenant, have relief in equity against him as upon a subsisting tenancy. *Stuyvesant v. Davis*, 9 Paige 427.

2. The receipt of rent which accrued subsequent to the forfeiture of

the lease is a waiver of the forfeiture, and will constitute a good defence to an ejectment suit brought against the lessee to enforce such forfeiture. *Ib.*

3. And it seems that if the landlord distrains for rent which accrued previous to the forfeiture, it is such an admission of a subsisting tenancy at the time of such distress, as to prevent a recovery in an ejectment suit upon a demise laid previous to that time. *Ib.*
4. The landlord, after he has re-entered for a forfeiture of the lease, may recover the rent which accrued previous to such forfeiture, in an action of debt, or an action upon the covenants in the lease. But for rent which became due subsequent to that time, he cannot recover as landlord; and his only remedy is to proceed for the meane profits, against the lessee or other person who has held the possession of the premises adversely to his claim. *Ib.*
5. Although by the condition of a lease it is provided that if any of the covenants on the part of the tenant are broken the unexpired term shall cease and determine, if the lease also contains the clause that in case of the non-performance of such covenants the landlord may re-enter, the lease is voidable only, at the election of the landlord, but not void. *Ib.*
6. Where, in a suit upon a judgment creditor's bill, a receiver of the defendant's property was appointed in October, 1841, and the defendant afterwards assigned his property to such receiver; and at the time of the appointment of the receiver the defendant was the tenant of certain premises, and on the 1st November, 1841, a quarter's rent became due; and afterwards the receiver took possession of the furniture on the premises and removed it therefrom; and soon after such furniture was removed, and while it was on the carts in the street near the premises, the landlord attempted to distrain the same for rent in arrear, but was prevented from doing so by the prior possession of the receiver: Held, that as the property was actually removed from the premises before the landlord attempted to exercise his right to distrain, his right of distress was gone; and that he had no right to follow the goods, as they were not the goods of the tenant at the time of their removal; but if the term had been assigned to the receiver, at the time of the assignment of the furniture of the judgment debtor, and the receiver had taken possession of the demised premises, or had otherwise elected to take the term under the assignment, that he would have taken

it *cum onere*, and for the time being would have been the tenant of the premises, and the removal of the furniture would have been a removal of the goods of the tenant, within the meaning of the statute. *Martin v. Black*, ib. 641.

7. At common law a distress for rent must be made upon the demised premises, and the right of the landlord to distrain terminates with the removal of the goods from the premises. *Ib.*
8. The statute which authorizes the landlord to pursue goods removed from the demised premises, and to seize them within thirty days after their removal, is confined to goods which belonged to the tenant at the time of such removal. *Ib.*
9. Where the goods of the tenant are turned out to a creditor, in payment of a debt, and are removed from the premises, the right of the landlord to seize such goods for rent in arrear is at an end, although the creditor has notice that there is rent in arrear. *Ib.*
10. But where the goods are remaining on the demised premises at the time the landlord attempts to exercise his right to distrain, and his only impediment is the possession of the court, by its receiver, the court will order the receiver to pay the rent in arrear out of the proceeds of the property, or will allow the landlord to proceed with his distress notwithstanding the receivership. *Ib.*

LEGACY. Where the sum given is repeated in the same writing, the legatee can take only one of the sums bequeathed; the latter sum is to be held a substitution; and they are not to be taken cumulatively, unless there be some evident intention, that they should be so considered. But the same sums payable at different times and upon different contingencies, are taken as accumulative or additional; so also where one sum is payable on a contingency, the other not. *Jones v. Exrs. of Creveling*, 4 Harrison 127.

2. A bequest in the following words: "I do give and bequeath unto my two grand-daughters, Christina Jones and Deborah Jones, each four hundred dollars, to be paid to them by my executors. If they are not of age at my decease, I order my executors to pay each of them, yearly and every year, the interest of four hundred dollars, until they arrive of age. I further order my executors to pay out of my estate to Christina Jones four hundred dollars, one year after my decease; and to pay Deborah Jones four hundred dollars, two years after my decease, in full of their legacies bequeathed to

them:" Held, that each legatee is entitled to eight hundred dollars. *Ib.*

LEX LOCI. A letter of guarantee, written in the United States, and addressed to a house in England, must be construed according to the laws of that country. *Bell and Grant v. Bruen*, 1 Howard 169.

2. Where a collision of vessels occurs in an English port, the rights of the parties depend upon the provisions of the British statutes then in force; and if doubts exist as to their true construction, the construction sanctioned by their own courts will be adopted. *Smith et al. v. Condry*, *ib.* 28.

LIMITATION OF ACTIONS. The statute of limitations of Virginia, passed in 1785, barred the right of entry, unless suit was brought within twenty years next after the cause of action accrued. The savings are infancy, coverture, &c., and such persons are barred if they do not bring their action within ten years next after their disabilities shall be removed. *Mercer's Lessee v. Seldon*, *ib.* 37.

2. Disabilities which bring a person within the exceptions of the statute, cannot be piled one upon another; but a party, claiming the benefit of the proviso, can only avail himself of the disability existing when the right of action first accrued. *Ib.*
3. The legal right of an owner of land, although he has recognised a sale of it, is not destroyed by lapse of time, or his right to bring an ejectment barred, provided he has, in the meantime, brought suit upon the securities which he took when he recognised the sale. *Buckannon and others v. Upshaw*, *ib.* 56.
4. Lapse of time is no defence where there is an unexecuted trust to pay debts, which a court of competent jurisdiction has decided to be unpaid in point of fact. *Bank of the United States v. Beverly*, *ib.* 134.
5. There must be conscience, good faith, and reasonable diligence, to call into action the powers of a court of equity. *M'Knight v. Taylor*, *ib.* 161.
6. In matters of account, where they are not barred by the act of limitations, courts of equity refuse to interfere after a considerable lapse of time, from considerations of public policy, and from the

- difficulty of doing entire justice, when the original transactions have become obscured by time, and the evidence may be lost. *Ib.*
7. A court of equity, which is never active in relief against conscience or public convenience, has always refused its aid to stale demands where the party has slept upon his rights for a great length of time. *Bowman and others v. Wathen and others*, *ib.* 189.
 8. Therefore, from the beginning of this jurisdiction, there was always a limitation of suit in this court. *Ib.*
 9. Every new right of action, in equity, that accrues to a party, whatever it may be, must be acted upon, at the utmost, within twenty years. *Ib.*
 10. Though the claimant may have been embarrassed by the frauds of others, or distressed, it is not sufficient to take the case out of the rule. *Ib.*
 11. And it is the same whether the party knew of an adverse possession, or, through negligence and a failure to look after their interests, permitted the title of another to grow into full maturity. *Ib.*

LIMITATION OF ESTATE. Where the owner of real estate, who died previous to the adoption of the revised statutes, devised the same to his daughter and only heir, during her life, and no longer, and after her death to her child or children if she should have any, and to their heirs and assigns forever; and by a subsequent clause of his will declared his will to be that in case his daughter should die and leave no lawful issue, his executors should sell his estate and distribute the proceeds thereof among certain collateral relatives; and the daughter of the testator afterwards married and had one child, who died after the death of its father but in the lifetime of its mother: Held, that the child of the daughter, upon its birth, became seised of an absolute remainder in fee in the property, subject to open and let in after born children; and that the limitation over to the collateral relatives of the testator was void, being limited upon an indefinite failure of issue of the daughter. *Macomb v. Miller*, 9 Paige 265.

2. And it being admitted that the daughter of the testator was physically incapable of having any other children: Held, that she had become entitled to an absolute estate in fee in the premises devised,

by the merger of her life estate, in the remainder in fee to which she was entitled as the heir at law of her deceased child. *Ib.*

MARRIAGE. The declarations of a deceased member of a family that the parents of it never were married, are admissible in evidence whether his connexion with that family was by blood or marriage. *Jewell's Lessee v. Jewell*, 1 Howard 219.

2. The acts and declarations of the parties being given in evidence on both sides on the question of marriage, an advertisement announcing their separation, and appearing in the principal commercial paper of the place of their residence, immediately after their separation, is part of the *res gesta*, and admissible in evidence. Whether or not it was inserted by the party, and if it was, what were his motives, are questions of fact for the jury. *Ib.*

3. If a written contract between the parties be offered in evidence, the purport of which is to show that the parties lived together on another basis than marriage, and the opposite party either denies the authenticity of the paper, or alleges that it was obtained by fraud, the question, whether there was a marriage or not, is still open to the jury upon the whole of the evidence. *Ib.*

4. The court, being equally divided, were unable to express an opinion upon the following questions, viz. 1. Whether, "if, before any sexual connexion between the parties, they, in the presence of her family and friends, agreed to marry, and did afterwards live together as man and wife," it was a legal marriage, and the tie indissoluble even by mutual consent; and 2. Whether, "if the contract be made *per verba de presenti*, and remains without cohabitation, or if made *per verba de futuro*, and be followed by consummation," it amounts to a valid marriage, which the parties (being competent as to age and consent) cannot dissolve, and is equally as binding as if made in *facie ecclesie*. *Ib.*

5. Declarations of parties and other attending circumstances, to be admissible in evidence as a part of the *res gesta*, must be contemporaneous with the main fact under consideration and to which they are intended to give a character. *In the matter of Taylor*, 9 Paige 611.

MORTGAGE. Where a mortgage is assigned by an executor to a distributee of an estate, and the property sells for less than the nominal amount, the distributee is not responsible for the differ-

- ence, in case he has acted with good faith and diligence. *Hammond's Ad. v. Lewis, Ex. of Washington*, 1 Howard 14.
2. Where the complainants loaned their note to the City Bank of Buffalo, to be discounted in New York for the benefit of the bank, and, to secure or indemnify the complainants, the cashier of the bank sealed up a package of its bills and left them in its vault, endorsing thereon that the package was intended as such security, but no entry of the transaction was made in the books of the bank, nor were the bills contained in the package charged as a part of the circulation of the institution: Held, that the package continued under the absolute control of the officers of the bank, and that the complainants were not entitled to the bills, and had no lien thereon either legal or equitable: Held, however, that the bank was primarily liable for the payment of the note of the complainants, which had been discounted for its benefit, and that if they should be compelled to pay the same, they would have a valid claim against the funds of the bank, in the hands of the receiver, as creditors of the institution. *Davenport v. City Bank of Buffalo*, 9 Paige 12.
 3. Where the mortgagee assigns his bond and mortgage and guarantees the collection of the debt, the assignee may make him a party to the bill of foreclosure; for the purpose of obtaining a decree over against him for the deficiency, in case the amount of such deficiency should not be collected from the mortgagor who is primarily liable therefor. *Leonard v. Morris*, ib. 90.
 4. If the mortgagor, or other party who is personally liable for the deficiency in a foreclosure case, is dead, his personal representatives may be made parties to the suit; to enable the complainant to obtain a decree that the deficiency be paid out of the estate in their hands, in a due course of administration. But no decree can be made against such representatives, which will entitle the complainant to an execution against them for such deficiency, until an account of the estate of the decedent has been taken; unless they admit assets in their hands sufficient to pay such deficiency and all other debts of the decedent of an equal and of a higher class. *Ib.*
 5. Where the complainant in a foreclosure suit unnecessarily makes the personal representatives of a deceased mortgagor or guarantor

parties to his bill, and thereby subjects the estate to the useless expense of taking an account of its administration here, the court in its discretion may refuse to allow him the extra costs of that part of his proceedings. *Ib.*

6. The complainant in a foreclosure suit cannot make the heirs or devisees of a deceased mortgagor, or guarantor, who have no interest in the mortgaged premises, parties to his bill, for the purpose of obtaining a decree over for the deficiency, against the real estate of the decedent which has come to them by descent or devise. *Ib.*
7. Where the owner of land made a fraudulent conveyance thereof, and the grantee went into possession and afterwards mortgaged the same to a bona fide mortgagee, upon a loan of money, on the security of the mortgage, which mortgagee had no notice of the fraud: Held, that the mortgage was a valid security upon the land, as against a creditor of the original owner, although such creditor had previous to the giving of the mortgage, but subsequent to such fraudulent conveyance, recovered a judgment against his debtor, and sold the premises upon an execution issued on such judgment: Also held, that such mortgage was a valid and prior security upon the land, for the whole sum agreed at the time of its execution to be advanced thereon, although a part of the amount was not actually paid to the mortgagor until some days after the execution of the mortgage, and although the sheriff's deed to the purchaser under such judgment and execution was recorded intermediate the recording of the mortgage and such payment. *Ledyard v. Butler*, ib. 132.
8. A bona fide purchaser or mortgagee, from a fraudulent grantee, who has neither actual nor constructive notice of the fraud, is entitled to a preference over a subsequent purchaser under a judgment against the fraudulent grantor, if such prior deed or mortgage is first recorded. *Ib.*
9. A mortgagee is a purchaser of the mortgaged premises, to the extent of his interest therein by virtue of his mortgage, within the intent and meaning of the statute of frauds. *Ib.*
10. Under the recording acts, as between a purchaser from the fraudulent grantee and one obtaining title under the fraudulent grantor, the priority of their conveyances depend upon the times when they were respectively recorded. *Ib.*

11. Where an application was made to the surveyor-general for a grant of several lots of land for the mutual benefit of L., Q. and W., and the applicants entered into a written agreement between themselves by which it was stipulated that L. should pay to the state the purchase money for the lands as the same should become due and should obtain the patents, and that such purchase money and interest should be refunded to him out of the proceeds of the sales of the lands, and that he should release one-third of the land to each of his associates after the whole moneys due to him should be paid; and the patents were afterwards issued to the executors and trustees of L. by whom the purchase money was paid: Held, that the executors and trustees of L. took the legal title to the land as trustees for all who were beneficially interested therein under the agreement. And Q. having transferred his interest in the lands to another person by an absolute conveyance, but in fact for the security of a debt of \$1480, which was stated in a written defeasance which authorized the creditor to sell the lands to pay the debt, and the creditor afterwards sold his interest in the land to the executors and trustees of L. for \$1000 only: Held, further, that the conveyance from Q. was only a mortgage, and that the executors and trustees of L. were only entitled to hold it for the amount paid by them, and the interest thereon, and not for the whole \$1480. *Quackenbush v. Leonard*, ib. 334.
12. Where R. who had given his bond and mortgage upon a tract of land to secure the payment of \$6000 and interest, afterwards sold a part of the mortgaged premises to H., and as a part of the consideration of such sale, H. assumed the payment of the whole of the bond and mortgage, and received a deed from R. which stated that the premises thereby conveyed were subject to the mortgage, and that the payment of the mortgage was assumed by H. the grantee, and that the amount of such mortgage constituted a part of the consideration of the deed: Held, that R. could not recover the amount of the bond and mortgage from the executors of H. before he had paid the same to the mortgagee; and that a recovery of mere nominal damages in a suit brought by R. against such executors, before he had paid any thing upon the bond and mortgage, was no bar to a subsequent suit for the amount which R. had been subsequently compelled to pay to the mortgagee:

Held, further, that the executors of H. would be liable in equity to the mortgagee for the payment of the deficiency, in case the proceeds of the sale of the part of the land which was conveyed to their testator should be insufficient to pay the mortgage debt and costs; but that the portion of the mortgaged premises conveyed to H. must first be resorted to for the payment of the mortgage, and that the personal estate of the decedent was, in equity, only chargeable with the deficiency. *Halsey v. Reed*, ib. 446.

13. Under the provisions of the revised statutes, as between the heirs or devisees and the personal representatives of a deceased mortgagor, the mortgaged premises are primarily chargeable with the payment of the mortgage, unless the decedent has, by his will, made a different provision for the payment of the mortgage debt. *Ib.*
14. Where the owner of mortgaged premises sells a part of the land to a purchaser who assumes the payment of the whole mortgage, and the owner of the residue of the land is obliged to pay the mortgage, the latter is entitled to an assignment of such mortgage, to enable him to obtain satisfaction out of the land of the person who has assumed the payment. *Ib.*
15. If the purchaser of mortgaged premises agrees with the mortgagor to pay off and discharge the mortgage thereon, for the protection and indemnity of the mortgagor, the mortgagee is in equity entitled to the benefit of such agreement. And such agreement is within the equity of the provision of the revised statutes which authorizes the court of chancery, in a foreclosure suit, to make a decree over for the deficiency against a third person who is liable for the payment of the mortgage debt. *Ib.*
16. A sale and assignment of the equity of redemption of mortgaged premises, where the mortgagee is in possession, necessarily carries with it to the purchaser the right to an account for the rents and profits of the premises, as an incident to the right of redemption, and as an equitable effect against the amount due upon the mortgage. *Ruckman v. Astor*, ib. 517.

NEW TRIAL. In cases of tort, the court will not set aside a verdict because it is against the weight of evidence, unless it manifests partiality, prejudice or intemperance in the minds of the jury. Nor will a verdict be set aside because the jury have formed a

- judgment upon the evidence, different from the court. *Taylor v. Vanderveer*, 4 Harrison 22.
2. The court will set aside a verdict, in a doubtful or contested case, if it appears that the prevailing party by himself, his retainers or agents, has been in private communication or held any conversation with one or more of the jurors, on the subject of the trial, during its progress. *Tomlin ads. Den, ex dem. Cox*, ib. 76.
 3. The court will not stop to inquire, whether the juror was influenced or not, by what was said to him. It is an inquiry of too delicate and difficult a character to be made the basis of judicial action in such a matter. It is enough, that the party was in private intercourse with the juror on the subject of the trial. *Ib.*
 4. An affidavit made by one who had been a witness in the cause, swearing to further important facts, not stated by him on the trial, because his recollection did not then serve him, is only cumulative evidence, and not sufficient ground for granting a new trial. *Ib.*
 5. A verdict will be set aside, as a verdict against the weight of evidence, where only one witness swears to his belief of the hand-writing of the defendant; and nine witnesses, (one of whom was called by the plaintiff himself,) all of them as familiar with the defendant's signature, and as well, or better qualified, from their course and habits of business, to judge, than that one witness was, swear to their disbelief of its being the defendant's hand-writing: unless there are circumstances in the case tending to sustain and corroborate the plaintiff's witness, and the genuineness of the signature. *Bell ads. Shields*, ib. 93.
 6. If a defendant, being informed by the plaintiff, that he is the holder of certain promissory notes endorsed by the defendant, without having the notes shown to him; at the request of the plaintiff, signs an agreement, reciting that he is such endorser and consenting that the plaintiff may give further time to the maker, upon receiving collateral security, without prejudice to the plaintiff's rights against the defendant, *as endorser*; and that the defendant will still hold himself "liable to pay the same, in the same manner, and to the same extent as he was then liable:" the defendant will not be precluded from setting up on the trial of the cause, that the endorsements were forgeries. *Ib.*
 7. Notwithstanding such agreement, the verdict ought to be for the

defendant, if the jury believe the name of the defendant has been forged: unless it appears that the defendant signed the agreement in bad faith, knowing of the forgery: or signed it negligently; and has thereby misled the plaintiff, and deprived him of an opportunity of otherwise securing himself. *Id.*

8. And whether even in such case the plaintiff can recover on the forged endorsements, or must seek his remedy in an action on the case, for a deceit, or upon a special agreement. *Quære? Id.*

NUISANCE. The occupation of a building, in a city, as a slaughter house is *prima facie* a nuisance to the neighbouring inhabitants, and may be restrained by injunction. And a general answer of the defendant denying that a slaughter house is a nuisance, is not sufficient to authorize the dissolution of an injunction restraining him from using his building as a slaughter house. *Catlin v. Valentine*, 9 Paige 575.

2. To constitute a nuisance, it is not necessary that the noxious trade or business should endanger the health of the neighbourhood. It is sufficient if it produces that which is offensive to the senses and which renders the enjoyment of life and property uncomfortable. *Id.*

PARTNERSHIP. Upon the dissolution of a copartnership by the death of one of the copartners, the survivor is entitled to close up the affairs of the firm, and he will not be deprived of that right by the appointment of a receiver, if he is responsible and acts in good faith. *Evans v. Evans*, *ib.* 178.

2. And the residence of the survivor in a foreign country, forms no ground of objection to his continuing to discharge the trust cast upon him by operation of law under the copartnership agreement, if he is perfectly responsible, and is closing up the affairs of the copartnership with reasonable diligence by a competent agent. *Id.*
3. Upon the dissolution of a partnership by the death of one of the copartners, the representatives of the deceased member of the firm are entitled to have the stock on hand sold and converted into money, so that the share of the copartnership funds belonging to them may be realized without any unnecessary delay. *Id.*

PATENT RIGHTS. If a person employed in the manufactory of another, whilst receiving wages, makes experiments at the expense and in the manufactory of his employer; has his wages increased

in consequence of the useful result of the experiments ; makes the article invented, and permits his employer to use it, no compensation for its use being paid or demanded ; and then obtains a patent : these facts will justify a presumption of a license to use the invention. *M'Clurg and others v. Kingsland and others*, 1 Howard 202.

2. Such an unmolested and notorious use of the invention prior to the application for a patent, will bring the case within the provisions of the 7th section of the act of 1839, c. 98. *Ib.*
3. The assignees of a patent right take it subject to the legal consequences of the previous acts of the patentee. *Ib.*
4. The 14th and 15th sections of the act of 1836, c. 357, prescribe the rules which must govern on the trial of actions for the violations of patent rights ; and these sections are operative, so far as they are applicable, notwithstanding the patent may have been granted before the passage of the act of 1836. *Ib.*
5. The words "any newly invented machine, manufacture, or composition of matter," in the 7th section of the act of 1839, have the same meaning as "invention," or "thing patented." *Ib.*

PRESIDENT OF THE UNITED STATES. The act of congress passed January 31, 1823, prohibiting the advance of public money in any case whatsoever to the disbursing officers of government, except under the special direction of the president, does not require the personal and ministerial performance of this duty, to be exercised in every instance by the president under his own hand. *Williams v. The United States*, ib. 290.

2. Such a practice, if it were possible, would absorb the duties of the various departments of the government in the personal action of the one chief executive officer, and be fraught with mischief to the public service. *Ib.*
3. The president's duty, in general, requires his superintendence of the administration, yet he cannot be required to become the administrative officer of every department and bureau, or to perform, in person, the numerous details incident to services which, nevertheless, he is, in a correct sense, by the constitution and laws required and expected to perform. *Ib.*
4. It is legal evidence that the president specially authorized and directed, in writing, the secretary of the treasury to make such

advances, and that such paper was destroyed when the treasury building was burned. It is sufficient if the witness state his belief that it was so destroyed. *Ib.*

PRINCIPAL AND AGENT. Where there have been, for several years, mutual and extensive dealings between two banks, and an account current kept between them, in which they mutually credited each other with the proceeds of all paper remitted for collection, when received, and charged all costs of protests, postage, &c.; accounts regularly transmitted from the one to the other and settled upon these principles; and upon the face of the paper transmitted it always appeared to be the property of the respective banks, and to be remitted by each of them upon its own account, there is a lien for a general balance of account upon the paper thus transmitted, no matter who may be its real owner. *Bank of the Metropolis v. The New England Bank*, ib. 234.

PROPERTY. Where the owner of a farm leased the same, with the cows and sheep then on it, to a tenant for the term of five years, at a certain annual rent, and the lease provided that cows of equal age and quality should be returned to the landlord, at the end of the term, and also the sheep; and a judgment creditor of the tenant, before the expiration of the term, levied his execution upon a part of the cows and sheep originally put on the farm by the landlord, and upon other cows and sheep which the tenant had purchased and put on in the place of those which had been sold: Held, that the landlord had no legal or equitable right to restrain the creditor from selling the cows and sheep thus levied on, to satisfy his execution. *Carpenter v. Griffin*, 9 Paige 310.

2. Where cattle, or implements of husbandry, or other articles which are not necessarily consumed in the using, are delivered by the landlord to his tenant, to enable the latter to cultivate and improve the premises, and to be returned in property of the same kind and value at the end of the term, but not in the same property specifically, the cattle or goods thus delivered belong to the tenant, and not to the landlord, during the term; and they may be sold by the tenant, or levied on by his creditors for the payment of his debts. *Ib.*

RAIL ROAD. A rail-road running through the streets of a city, which does not materially interfere with the use of the streets for

ordinary purposes, or injure the value of the adjacent property, is not a nuisance. *Hamilton v. The New York and Harlem Rail Road Company*, ib. 171.

RENT. Rent cannot be apportioned between the personal representative and the heir. *Allen v. Vankhouton Admr. &c.*, 4 Harrison 47.

2. If the lessor dies, the accruing rent, which becomes payable, at a day subsequent to his death, must be sued for by the heir or devisee; and not by the administrator. *Ib.*

REPLEVIN. A general or special property in goods, with the actual or constructive possession, is sufficient to maintain either trespass or replevin. *Haythorn v. Rushforth and Andrews*, ib. 160.

2. It is not necessary there should be a manual seizing of the property to constitute a tortious taking. An unlawful intermeddling with, or an exercise or claim of dominion over it, without authority or right, will render the party liable to trespass or replevin. *Ib.*

3. Whether the action of replevin may be sustained for a wrongful detention, when the taking was not tortious: *Quære?* *Ib.*

RIPARIAN PROPERTY. Where, in the conveyance of a lot situated in the city of Rochester, it was described as a *mill lot*, beginning, &c., and running "eastwardly to the *Genesee river*; thence northwardly along the shore of said river to *Buffalo street*," &c.: Held, that no part of the bed of the river passed under the conveyance, but that the grantee took only to low water mark. *Child v. Starr*, 4 Hill 369.

SET-OFF. A. having recovered judgment against C., a suit was commenced by A. and B, against C., which was referred; and a short time before the making of the referee's report, which found a large balance due to C., but after the referee had heard the matter and C. had ascertained what the report would be, he assigned the demand to D. for a valuable consideration, and judgment was duly perfected upon the report: Held, that A. was not entitled to a set-off, inasmuch as no such right existed when the assignment was made; the judgment in C.'s favour having been perfected afterwards. *Graves v. Woodbury*, ib. 559.

STATUTE. The unqualified repeal of a repealing statute revives the original enactment. *Per* Bronson J. *Gale v. Mead*, ib. 109.

SURETY. When a collector is continued in office for more than

one term, but gives different sureties, the liability of the sureties is to be estimated just as if a new person had been appointed to fill the second term. *The United States v. Eckford's Executors*, 1 Howard 250.

2. When the accounts of a collector are returned to the treasury quarterly, and the date of the commencement and expiration of his term of office is on some intermediate day between the beginning and end of the quarter, a re-statement and treasury transcript of his account up to the end of his term, is legal evidence in a suit against the sureties. *Ib.*
3. Such a re-statement does not falsify the general accounts, but arranges the items of debits and credits so as to exhibit the transactions of the collector during the four years for which the sureties were responsible. *Ib.*
4. The amount charged to the collector at the commencement of his second term is only *prima facie* evidence against the sureties. *Ib.*
5. But payments into the treasury of moneys accruing and received in the second term, should not be applied to the extinguishment of a balance apparently due at the end of the first term. Payments made in the subsequent term, of moneys received on duty bonds, or otherwise, which remained charged to the collector as of the preceding official term, should be so applied. *Ib.*
6. The settlement of quarterly accounts at the treasury, running on in a continued series, is not conclusive. The officers of the treasury cannot, by any exercise of their discretion, enlarge or restrict the obligation of the collector's bond. Much less can they, by the mere fact of keeping an account current in which debits and credits are entered as they occur, and without any express appropriation of payments, affect the rights of sureties. *Ib.*
7. The rule of law is settled, that extending to the principal further time of payment, will discharge the surety, unless there be evidence of assent by the surety, to such extension. *Solomon ads. Gregory*, 9 Harrison 112.
8. The surety is not discharged if there be evidence of tacit assent on his part:

But it is matter of defence, and generally speaking, can only avail the surety when set up as a bar to a recovery against him. Cases founded upon bail and replevin bonds and recognizances of

bail, from their peculiar character, form an exception to the general rule. *Ib.*

9. Courts will not interfere in a summary way and relieve the surety after judgment and execution against him, by ordering moneys collected under execution, to be returned to him, on the ground, that the plaintiff has extended time of payment of execution against the principal. *Ib.*
10. A mere surety for a debt will not be bound by a decree or judgment pronounced in a suit between his principal and the creditor, even though the suit was conducted, on the part of the principal, exclusively by the surety as his agent. *Jackson v. Griswold*, 4 Hill 522.
11. Otherwise, *semble*, if the surety voluntarily came in and litigated as such, in the name of his principal, with the assent of the creditor. *Ib.*
12. Though a creditor neglect to prosecute for his debt after being notified to do so by the *surety*, this will not discharge the surety if the principal was insolvent at the time. *Herrick v. Borst*, *ib.* 650.
13. Where the circuit judge charged that the term *solvent*, in such case, meant that the principal was able to pay *all his debts* from his own means, or that his property was so situated that *all his debts* might have been collected out of it by legal process: Held, that the charge was sufficiently favourable to the surety, and a motion for a new trial made in his behalf was therefore denied.
14. Held further, that mere probable solvency of the principal *in reference to the debt in question*, at the time of giving notice to prosecute, would not bring the case within the rule. *Ib.*

TENANCY BY THE CURTESY. The general rule of law is, that there must be an entry during coverture, to enable the husband to claim a tenancy by the curtesy. *Mercer's Lessee v. Selden*, 1 Howard 37.

TROVER. To maintain trover against two joint bailees, a demand of and refusal by one is not sufficient; a conversion by both must be shown. *Mitchell v. Williams*, 4 Hill 13.

2. In the case of partners the rule is different; for each being the general agent of the other, a refusal by one is evidence of a conversion by both. *Per Cowen J.* *Ib.*

3. W. & R. having hired of M. a number of cows for a year, the former (W.) took possession of and kept them on his farm, several miles distant from R.'s residence. A few months after the hiring, the cows were sold under an execution against W., issued upon a void justice's judgment. At the expiration of the year, the cows being still in W.'s possession, M. demanded them of him and he refused to deliver them up. A like demand was made of R. at his residence, who said "he would have nothing to do with the matter," and refused to go and see W. on the subject: Held, in trover against W. and R., that whether enough had been shown to prove a conversion by R. was a question of fact to be submitted to the jury; and the circuit judge having directed them to find a conversion by both, a new trial was ordered. *Ib.*
4. If R.'s refusal to act in the delivery of the cows proceeded from an honest desire to avoid a litigation which he supposed might arise out of the sale under the void judgment, he was not guilty of a conversion. *Per Cowen J. Ib.*
5. Otherwise, if his refusal to act proceeded from a design to countenance or aid W. in unlawfully withholding the cows from M., or to embarrass the latter in his endeavour to obtain possession. *Ib.*
6. In general, the property being present, or under the undisputed control of the party of whom it is demanded, his mere neglect to deliver, without saying a word, or a refusal on his part to point out the property and act in the delivery, will be *prima facie* evidence of a conversion. *Ib.*
7. Where there is proof of a positive and unexcused refusal to deliver on demand made, the judge may advise the jury, as matter of law, to find a conversion. *Ib.*

USURY. M., being desirous of raising money upon a note at four months, drawn by himself and endorsed for his accommodation by B. and L., authorized a broker to buy an additional name or guaranty for the purpose of getting the note discounted. Application was accordingly made to K., also a broker, who endorsed the note on receiving a commission of two and a half or three per cent., and it was then discounted at a bank. About the time it fell due, M. made another note, corresponding in amount, which, after being endorsed, was discounted by K., and the proceeds ap-

plied in payment of the first. The second note not being met at maturity, K. brought an action upon it against the maker and endorsers, which was referred, and the referee reported in K.'s favour: Held, on motion to set aside the report, that the taking of the commission by K. did not render the transaction *per se* usurious, and the motion was therefore denied. *Ketchum v. Barber*, ib. 224.

2. C. covenanted to assign to a bank, bonds and mortgages on real estate to the amount of \$13,000, payable in five years, with interest semi-annually, and to guaranty the payment of them; in consideration whereof, the bank agreed to transfer to C. certain stock to the amount of \$6500 at its nominal value, but which was then twenty-five per cent. below par, and to pay him the balance in money. Afterwards, the bonds and mortgages not having been assigned, the bank transferred the stock and paid the money on receiving two notes for \$6500 each, agreeing to take the bonds and mortgages in payment, if delivered before the notes became due: Held, in an action upon one of the notes, that the transaction was usurious; and a verdict finding it otherwise was set aside. *Seymour v. Strong*, ib. 255.
3. A bond and mortgage for \$3000, payable one year from date, with interest to become due half yearly, and on which over five months' interest had already accrued, were assigned absolutely by the holder for \$2600, in order to raise money. The assignment stated the consideration paid by the assignee to be \$3000, and contained a covenant that thus much was due and owing on the bond and mortgage. At the time of executing the assignment; the assignor also executed to the assignee a bond, with surety, conditioned that the mortgagor should pay the \$3000 together with the interest, by the day appointed for that purpose in the securities assigned. On a bill filed by the assignor to set aside the assignment and have the bond of guaranty cancelled: Held, that the transaction was, on its face, a mere sale of a chose in action, unconnected with a loan, and therefore not usurious *per se*. *Rapelye v. Anderson*, ib. 472.
4. Money which has been recovered and collected in a suit at law upon an usurious security, in which suit there was a legal defence, cannot be recovered back from the plaintiff in such suit; either at law or in equity. *Bartholomew v. Yaw*, 9 Page 165.

5. The principle of not giving effect to an agreement for the compounding of interest, which is to become due, is not based upon the usury laws; but is adopted as a rule of public policy, to prevent accumulations of compound interest in favour of creditors who neglect to collect their interest when it becomes due. And the principle upon which the rule is founded does not apply to a case where one man advances money to purchase property for the benefit of himself and another, to be refunded to him with compound interest, out of the proceeds of the sale of the property. *Quackenbush v. Leonard*, ib. 334.
6. Where a party applied for a loan of money, which was agreed to be loaned to him upon usury, and he agreed to obtain his brother's bond and mortgage to secure the loan and the usurious premium, and the borrower thereupon forged a bond and mortgage upon his brother for the amount, and transferred it to the lender and received the money thereon, deducting the usurious premium: Held, that the lender could not recover back the money lent upon usury by reason of such fraud; and that the brother, whose name had been forged, was not liable for a part of the money which had been applied to pay off an incumbrance upon his property, he not being privy to the forgery. *Thomas v. Fish*, ib. 478.

VENDOR AND VENDEE. Where there is a sale of land *per aversionem*, or at a gross sum for the whole premises, and not at a specified price by the foot or acre, the purchaser is entitled to the land contained within the designated boundaries of his grant, be it more or less; without reference to the quantity or measure of the premises as mentioned in the contract or conveyance. *The Morris Canal Company v. Emmett*, ib. 168.

2. Parties may so frame a contract for the sale of land as to make the time of payment a material part of the agreement. And where, from the terms of the contract, it appears that the parties thereto intended that the purchaser should not have the land unless the purchase money was actually paid at the day specified in such contract, if the money is not paid a court of chancery will not decree the performance of the contract. *Crippen v. Heermance*, ib. 211.
3. In a suit for the specific performance of a contract for the conveyance of land brought by the vendee against the heir at law of

the vendor, where it appeared that the vendor had died insolvent and indebted to the vendee: Held, that the vendee was entitled to have such debt offset against a balance due for the purchase money. *Sutphen v. Fowler*, ib, 280.

4. A purchaser who is himself chargeable with notice of the equitable claim of a third person to the premises purchased, may protect his title by showing that his grantor was a bona fide purchaser without notice. *Griffith v. Griffith and others*, ib, 315.
5. Where the purchaser employs an attorney to examine the title to the premises which he is about to purchase, notice to the attorney of the equitable claim of a third person to such premises is constructive notice to such purchaser. *Ib.*

VESSELS. Where a collision of vessels occurs in an English port, the rights of the parties depend upon the provisions of the British statutes then in force; and if doubts exist as to their true construction, this court will adopt that which is sanctioned by their own courts. *Smith and others v. Condry*, 1 Howard 28.

2. By the English statutes, as interpreted in their courts, the master or owner of a vessel trading to or from the port of Liverpool, is not answerable for damages occasioned by the fault of the pilot. *Ib.*
3. The actual damage sustained by the party at the time and place of injury, and not probable profits at the port of destination, ought to be the measure of value in damages, in cases of collision as well as in cases of insurance. *Ib.*
4. By whose fault the accident happened, is a question of fact for the jury, to be decided by them upon the whole of the evidence. *Ib.*
5. If a ship be at anchor with no sails set, and in a proper place for anchoring, and another ship, under sail, occasions damage to her, the latter is liable. *Strout and others v. Foster*, ib, 89.
6. But if the place of anchorage be an improper place, the owners of the vessel which is injured must abide the consequences of the misconduct of the master. *Ib.*
7. The thoroughfare of the pass of the Mississippi river, at its mouth, is not a proper place to anchor. *Ib.*
8. A mortgagee of a ship, who has taken possession and caused it to be registered in his own name, will, in general, be liable for supplies furnished and repairs made; and this, though his relation to the ship was unknown to the creditor when the demand arose. *Miln v. Spinola*, 4 Hill 177.

WILLS. Where the testator, by his will, directed that his residuary estate should be divided equally among the children of his sister and of his two brothers, when they should severally become of age: Held, that each child was entitled to an equal share of the estate *per capita*, and not by representation of their respective parents. Held also, that the eldest daughter of one of the brothers, actually born before the marriage of her parents, although she had been recognised by her reputed father and was brought up by him in the same manner as his other children, was not entitled to a distributive share of the estate of the testator. *Collins v. Horie*, 9 Paige 81.

2. Where there are legitimate children in existence at the time of making the will, so as to satisfy the words of the devise or bequest in their primary sense, an illegitimate child cannot take under a general devise or bequest to children, as a class, unless there is something else appearing in the will to show that the testator intended to include others besides legitimate children. *Ib.*
3. In a residuary or other bequest, to children and grand-children, or brothers and sisters, and nephews and nieces, as a class, all the legatees take equally *per capita*; unless there is something in the will itself indicating a different intention on the part of the testator. *Ib.*
4. Where a testatrix, whose only son and heir was an idiot and had a large property in the hands of his committee, the income of which was more than sufficient for his support, bequeathed \$1000 for the use and benefit of such son, to be appropriated at the discretion of her executors, and directed that so much of that legacy as her executors should not appropriate for his use during his life, should at his decease go to the Foreign Mission School, a supposed charitable institution which in fact had no existence; and the testatrix, after making a specific devise of a part of her real estate, and giving specific and pecuniary legacies to a large amount, directed her executors to sell the real property not specifically devised, and bequeathed the proceeds and all her residuary estate, to the Home Missionary Society, in case it did not exceed \$1000, and the residue beyond that sum to the children of her niece: Held, that the committee of the idiot were not entitled to have the \$1000 legacy applied to his general support

while the income of his estate was more than sufficient for that purpose ; and that the executors were only bound to apply it if it should become necessary in consequence of a loss of his property. Held also, that the limitation over to the supposed charitable institution having failed, the unexpended balance of this legacy would fall into the general residue of the personal estate of the testatrix, and would belong to her residuary legatees. *King v. Strong*, ib. 94.

5. Where a testator, who had three sons and two daughters, made his will subsequent to the revised statutes and devised and bequeathed his real and personal estate in trust to permit his widow to enjoy the use of the rents and income thereof during her life or widowhood, subject to the payment of taxes, assessments, insurance, and the interest upon the incumbrances, and upon condition that his eldest daughter should live with her and be supported out of such rents and income ; and by the *second* and *third* clauses of the will the devisee in trust was directed, after the death or intermarriage of the widow, to pay the rents of lot No. 26, after payment of taxes, assessments, and insurance, and keeping down interest on incumbrances, to his son P. for life : and the rents and income of lot No. 30, to his son S. for life ; and by the *fourth* clause, he gave a similar beneficial interest in the rents and profits of lot No. 28, to his eldest daughter, who was the devisee in trust, and directed her to apply so much of the rents and profits of these lots respectively as could be spared conveniently to the payment of the principal of the incumbrances thereon, after the death or intermarriage of the widow ; and further directed that if either of those three of his children should marry and leave issue, the rent of his or her lot, instead of being paid to the parent, should be applied by the devisee in trust, for the support and education of such issue ; and by the *fifth* clause he further directed, that if either of the three died without leaving issue, the rents of that share should go to the survivor or survivors in equal portions ; but if either died leaving issue, the rent to go to such issue ; and by the *sixth* clause, he devised lot No. 51 to those three children in fee from and after the death or marriage of his widow, but upon condition that if either should sell his or her interest therein without the consent of the others, it should be forfeited to the others,

and that the whole income of this lot should be applied to satisfy the incumbrances on lot No. 26, 28 and 30; and by the *seventh* clause, he devised to his youngest daughter, after the death or marriage of the widow, another of his lots free from the control of her husband, the rents to be paid to her on her separate receipt; and by the *eighth* clause, he devised to his son D., after the death or marriage of the widow, lot No. 32 for life with remainder in fee to his heirs, subject to the incumbrance thereon; and by the *ninth* clause, he devised lot No. 5 to his eldest daughter in fee, with the furniture and fixtures, &c., from and after the death or marriage of the widow; and by the *tenth* clause, he declared and directed that if either of his children should die without leaving issue, the share or portion of his estate, which by his will was given to such child should go to the survivors, but if either died leaving issue, such issue should take the share of the parent; and by the *eleventh* clause, he devised and bequeathed the residue of his estate to all his children in fee, and appointed his eldest daughter trustee for all and every of the purposes of his will. *Parks v. Parks*, ib. 107.

6. Held, that the general intention of the testator, as indicated by his will, was to give to his wife the rents and income of his estate during her life or widowhood, subject to the charges for assessments, &c., and to the charge of the support of his eldest daughter if she continued to reside with her mother; and after the death or re-marriage of the widow, to give to his five children in severalty the use or income of specific portions of the same property for life, subject to the charges and incumbrances upon their several lots or portions; and with remainder in fee, in the same specific portions of the estate, to the issue of the same children who had the life estates in their respective shares; and that if either of the five children died without leaving issue, his or her share or portion of the estate should go to the survivors in fee. And that this general intention of the testator might be carried into effect, either by giving legal estates to the objects of his bounty to the extent of their beneficial interests in their several portions of the property, or through the medium of a trustee to receive the income and apply it to their use, without suspending the power of alienation of any portion of the property for a longer period than is allowed by the revised statutes. *Id.*

7. Held also, that the interest of the widow in the income of the property, during her life or widowhood, being entirely distinct from the subsequent interests therein which were given to the children and their issue respectively, the devise or bequest to her was valid, whether the legal estate was vested in her, or was in the eldest daughter as trustee, to receive the income for her use and benefit; even if the limitations of the subsequent interests in different portions of the same property were not authorized by law. But that under the provisions of the revised statutes the legal title to the real estate, was in the widow, during her life or widowhood, and not in the eldest daughter as the trustee for her. *Ib.*
8. Held also, that the devise of the lots No. 26 and 30 as contained in the second and third clauses of the will created valid trusts of the legal estate during the lives of the testator's sons P. and S. under the provisions of the revised statutes; and that the trust to apply the rents and profits to keep down the interest and to reduce the principal of the incumbrances on those lots was also valid. *Ib.*
9. Held also, that the three children only took an estate for their respective lives, in lot No. 51, under the sixth clause of the will, in connexion with the general clause limiting the shares of the several children over to their issue or to the survivors of such as should die without leaving issue; and that the other son and the two daughters took also vested interests for life in their several lots, under the fourth, seventh, eighth and ninth clauses of the will, subject to the life interest of the widow therein; and that the testator's eldest daughter and his son D. took the legal title in their several lots to the extent of their beneficial interests therein. But whether the youngest daughter took a legal estate in her lot, or only an interest in the income thereof, as a trust estate. *Quære? Ib.*
10. Held further, that none of the issue of the children would take any interest in the shares of their parents, after the termination of their lives, as an interest in a trust estate; but that the interest to which such issue would be entitled, under the tenth clause of the will, were remainders in fee of the legal estate, in the portions of the parents respectively. *Ib.*
11. Where a testator devised the rents and profits of his real estate, and the income of his personal property, to his widow for life; and after the making of his will acquired the right to the profits of a

toll bridge for a term of years: Held, that the widow was not entitled to the whole of the profits of the toll bridge during her life, but only to the interest or income of its value at the death of the testator. *Cairns v. Chaubert*, ib. 160.

12. A specific bequest of successive estates in terms for years, and other chattels real, gives to the respective owners the whole income of the property during the continuance of their respective estates. *Ib.*

13. But where an estate for life, or an interest short of an absolute ownership is given in the general residue of the testator's personal property, terms for years and other perishable funds or property which may be consumed in the using, must be converted and invested in such a way as to produce a permanent capital; the interest or income of which capital alone belongs to the owner of the particular estate in such general residue. *Ib.*

14. Where the testator, by his will, made in 1831, expressed his desire that his estate should not be divided until February, 1840, and directed that his wife should from time to time receive such sums out of the estate as she should request, previous to the division of the estate, to enable her to maintain the testator's family; and in case of her death before the division of the estate, he directed his executors to devote so much money to maintain the family as they should consider best; and he further directed such executors to sell so much of his real estate from time to time as they should judge necessary or prudent; and to borrow money upon mortgages of the estate; and the testator further directed a division of the estate to be made on the first of February, 1840, and that all his estate and all the property which his children had derived from him, or had purchased with funds furnished by him, should be valued by appraisers to be appointed by his executors, and that the aggregate amount of such valuation should be divided into five equal parts, and that so much of the said aggregate estate as should be equal in value to one of said five parts, should go to each of his children and their respective heirs, including in the portions of each the property which each one had derived from or purchased with funds furnished by the testator; and he authorized his executors to distribute the estate in kind, or to sell the same and divide the proceeds thereof, as they should judge best; and the testa-

tor further directed that two specific sums should be set apart and invested, for the payment of an annuity to his mother, and a legacy to B. and her daughter, and the testator then devised all his estate to his executors in trust, to enable them to carry into effect the provisions and directions of the will: Held, that the bequests of the annuity and the legacy were valid, although the limitation over of the principal sum, to be invested for the payment of such annuity, was void; as the annuity could be separated from such principal sum, by taking so much of the estate as would be sufficient to purchase the annuity upon the principal of valuing life annuities.

15. Held also, that the trust to receive the rents and profits, after the death of the widow of the testator and previous to the division of the estate, and to apply so much thereof to the support of the surviving members of the family, as the executors should consider best, was void, as this rendered the trust estate, or so much thereof as was not necessary to be sold to pay debts and legacies, inalienable for a term in gross and not determinable at the expiration of not more than two lives in being at the death of the testator.

16. Held also, that although the trust to provide for the surviving members of the family, after the death of the widow of the testator, was illegal and void, yet as it was wholly disconnected from the trust to receive the rents, &c., and apply them to the support of the widow and such of the family as chose to live with her, which was necessarily limited to the life of the widow, such void trust did not render the trust estate invalid, in the hands of the trustees, during the life of the widow.

17. Held further, that the power to divide the estate in 1840, was a mere power in trust which did not require the continuance of the legal estate in the trustees to sustain it; and that if the power to sell at the end of an absolute term, not depending on lives in being at the death of the testator, would render the estate inalienable until February, 1840, that part of the power would alone be void, and could not prevent the execution of the residue of the power authorizing a division or partition of the property.

18. Held also, that the provisions of the will did not deprive the widow of the testator of her dower in the real estate of her husband, so as to require her to elect between such dower and the provision made for her by the will. *Irving v. De Kay*, ib. 521.

19. Where the testator devised a farm and the stock and farming utensils thereon to his son W. for eight years subject to an annual rent of \$50, to be paid to the testator's grandson R., for the use of the farm and the stock thereon, and at the end of the eight years the testator devised the farm to R., upon condition that he settled and resided on the farm, and in case he sold the farm, that the proceeds of such sale should be equally divided among the testator's lawful heirs; and the testator then gave several legacies to be paid by R. in yearly payments, the first payable at the end of one year after the testator's decease; and after the death of the testator, W. took possession of the farm and continued in possession during the eight years, and paid the yearly rent of \$50 from time to time as it became due to R. until his death; and R. who died within the eight years had not at the time of his death either taken possession of the farm, otherwise than by receiving such rents, nor paid the legacies; but after his death his father had offered to pay the legacies: Held, that an estate in fee in the farm vested in R. on the decease of the testator, subject to the right of W. to occupy it for eight years at an annual rent of \$50; and that the condition that R. should settle and reside upon the farm was a condition subsequent, the non-performance of which did not divest the estate previously vested in him. Also held, that the legacies were a personal charge on R. in respect to the estate devised, so far at least as the rents of the premises were insufficient to pay the same, and that having accepted the estate devised, by receiving the rents, he was bound to pay off the legacies; and that this personal charge, independent of the provisions of the revised statutes rendering words of perpetuity in a grant or devise unnecessary, was sufficient to give R. an estate in fee in the premises. *M'Lachlan v. M'Lachlan*, ib. 534.

20. Where the condition which is to divest an estate becomes impossible, by the act of God, the condition is discharged. *Ib.*

21. Where a testator in his will devises lands to a devisee in fee, and then gives several legacies to be paid by such devisee, and the devisee survives the testator and then dies, his personal estate is the primary fund for the payment of such legacies. *Ib.*

WARRANTY. The proper measure of damages for the breach of a warranty of soundness on the sale of a horse, is the difference

between the value of the horse at the time of the sale, considering him as sound, and his value with the defect complained of. *Cary v. Gruman*, 4 Hill 625.

2. Accordingly, where the court below rejected evidence of what would have been the real value of the horse at the time of sale if sound, and instructed the jury that the proper measure of damages was the difference between the *price paid* for him, and his value with the defect: Held erroneous, and the judgment was therefore reversed. *Ib.*

CRITICAL NOTICE.

A Treatise on the Law of Slander and Libel, and Incidentally of Malicious Prosecutions. By THOMAS STARKIE Esq., of Lincoln's Inn, Barrister at Law.—From the second English edition of 1830, with Notes and References to American Cases and to English Decisions since 1830. By JOHN L. WENDELL, Counsellor at Law. In 2 vols. Albany: C. Van Benthuyssen & Co. 1843.

MR. JUSTICE STORY, in his recent appropriate and beautiful tribute to the memory of the late Attorney-general of the United States, takes occasion feelingly to deplore the general absence from among us of men "of severe studies in jurisprudence—willing to devote their days and nights to the mastery and improvement of it as a great science, and looking for the fame that comes of devotion like this. Such study is not fanned by the breath of popular applause, and so it is rare." A great truth is here expressed—one which the profoundest legal minds of our country have long felt—and which especially comes home to our observation, whenever we open the works of the great sages and master-spirits of the law, in any of its prominent departments. Whether this state of things is attributable to the unprecedented multiplication of the objects of science and research, which distinguishes the present day beyond all preceding ages—to the practical abandonment of that system of division of labour, which is as applicable to mental as to physical exertion—or to the general prevalence of that excursive range of intellectual pursuits which the spirit of the age and the nature of our institutions

are eminently calculated to incite and to foster,—whether any or all these causes have operated and are operating to the production of this superficial spirit of legal analysis, we cannot now stop to inquire. Certain it is that it exists to a very great, if not to an alarming extent; and there can be little doubt of its inevitable tendency, to contract the circle of authoritative expounders of that “perfection of reason”—the common law.

Viewed with reference to our free institutions—the predominating influence of public sentiment—and the rapidly expanding ideas of civil, political and personal rights, now so generally and extensively diffused,—a just conception of the fundamental principles, in suberviency to which the liberty of speech and of the press may be exercised and enjoyed, becomes of paramount importance. The history of the law of slander and of libel, from the first rude development of its germs in the infancy of civilization, through its successive stages to the present period, may well be regarded as one of the most interesting and instructive, as well to the statesman and the scholar as to the professional student, which the annals of judicial polity can furnish. In one of its most important departments, its progress will be found intimately associated with the names and the fame of some of the greatest champions of civil and religious liberty in the old and new world. And it is scarcely too much to say, that not a few of the decisive battles which have been waged between despotism and freedom—between the champions of oppression, rooted and grounded in the precedents and policy of past ages, and the assertors of liberty and progress—have been contested on this great arena of the law of libel. The statute 32 Geo. 3, c. 60, was a concession to the spirit of the age and the demands of an advancing civilization, probably in no respect inferior in importance to those extorted from king John by the barons at Runnymede: and the lustre conferred on the fame of Hamilton, by the eighth section of the seventh article of the constitution of the state of New York, suffers nothing in comparison with that which surrounds his reputation as a statesman and patriot of the purest and best days of the American republic. The principle upon which these enduring monuments of civil freedom were based, was distinctly recognised and clearly and boldly proclaimed by lord chief justice Vaughan, more than a century prior to their final adoption as component parts of the stately fabric of free government.

On the return of the *habeas corpus* sued out by that indomitable juror Edward Bushel, who with his fellows, had been committed for his refusal to register the tyrannical edict of the recorder of London (*his name we believe has not come down to us*), on the trial of "two Quakers, Penn and Mead, indicted for seditiously preaching to a multitude tumultuously assembled in Gracechurch street," the great doctrines of the common law on this subject were defended with a shrewdness and vigour of illustration which was admirably calculated (in his own forcible language) to "take off the veil and colour of words which make a show of being something, and in truth are nothing. If," continues this veteran advocate of sound principles, "the meaning of these words, *finding against the direction of the court in matter of law*, be that the judge, having heard the evidence given in court. (for he knows no other), shall tell the jury upon this evidence, the law is for the plaintiff or for the defendant, and you are under the pain of fine and imprisonment to find the contrary—every man sees that the jury is but a troublesome delay, great charge, and of no use in determining right and wrong; and therefore the trial by them may better be abolished than continued—which were a strange, new-found conclusion, after a trial so celebrated for many hundreds of years. For if the judge from the evidence shall by his own judgment, first resolve upon any trial *what the fact is*; and so knowing the fact, shall then resolve *what the law is*, and order the jury severally to find accordingly; what either necessary or convenient use, can be fancied of juries, or to continue trials by them at all?" What, indeed! And yet the history of the law of libel, from the time of pronouncing this masterly exposition of one of its fundamental principles to the present day, shows the frequent recurrence of an apparently irresistible inclination on the part of courts to deprive the jury of their settled prerogative of determining from all the *facts* which may be laid before them, the innocence or the guilt of the party accused, either civilly or criminally, of defamation oral or written.

The number and importance of the recent decisions, both in England and this country, with reference to the various principles involved in the law of slander and of libel, have for some time past, rendered a new edition of the standard elementary work devoted to the elucidation of this branch of the law, a *desideratum* with the

profession. Without desiring to detract in the least from the substantial merits of former editions of Starkie, we may perhaps be permitted to question, whether sufficient prominence was, in all instances, given to those leading principles upon which the courts in our country had planted themselves in their expositions of the law as applicable to our somewhat anomalous population and peculiar institutions of government. To the extent that this defect existed, a complete remedy has been applied by the present editor; who seems not only to have thoroughly studied the peculiarities of this species of action, but to have traced the advancing footsteps of the courts in England and this country, with an accuracy and vigilance which can result only from long and systematic habits of observation. For this task judge Wendell is peculiarly fitted from his late employment as a reporter of the decisions of the higher courts of law in the state of New York, a station which, as most of our readers are doubtless aware, he held for nearly a quarter of a century, and from which he has but recently retired, to resume the more active duties of his profession. From the brief examination which we have been able to give to the edition now before us, we have no hesitation in affirming, that in the arrangement and collocation of the several American and recent English cases illustrative of this department of the law, and in the clear and lucid exposition of its present state which the introduction supplies, the editor has conferred a substantial benefit on his professional brethren throughout the union.

The application of the principles of the law of libel and of slander, as finally established by a long series of judicial decisions during the progress of some three centuries, to the various exigencies of an advancing civilization, has not, as is well known, been unattended by embarrassment and difficulty. And yet so deeply have those principles been imbedded in the public confidence and regard—so clearly and distinctly have they been announced by the standard authorities in this branch of legal science, and so admirably do they harmonize with the soundest convictions of the understanding, and the unperverted dictates of the moral sense—that it would be difficult to find any department of the common law of equal extent and importance, less obstructed by conflicting interpretations, or less free from doubt and obscurity, with reference either to its import, or its applicability to the constantly recurring emergencies of social intercourse. One

great object of the editor of the present edition of *the work* now under consideration, we understand from the introduction to be, to demonstrate that whatever of difficulty and embarrassment has been experienced in the practical administration of the law on this head, has originated rather in a misconception of the *mode* by which the defendant in civil actions for libel or slander, is required by the settled rules of pleading, to avail himself of whatever defence he may have, and of the legal effect of the pleas when so interposed, than to any obscurity in the fundamental principles of the action itself. The law imposes no preliminary restraints upon the perfect freedom of speech and of the press; but subject to certain well defined exceptions, based upon the paramount requisitions of the general welfare of the community at large, holds each individual *responsible* for such an *exercise* of that freedom as shall, *in the judgment of a jury of his peers*, be found to trench upon the equal rights of others, or upon the quiet and good order of society in any of its departments. Duly appreciating the importance and value of an unblemished character to *each* individual, however humble or obscure his station or limited his means of usefulness, it secures to him, so far as such security can be *afforded* by human institutions, an exemption from calumny and detraction: while at the same time it interposes no restraints to the full and free communication, *with good motives and for justifiable ends*, of such facts, or even suppositions or convictions of facts, honestly entertained, as in the ordinary intercourse of social life, may be either of general or particular interest to any portion of the community—may conduce to their information, in matters material to their welfare, or secure them from imposition, fraud, or error in the transaction of their ordinary concerns. Where no considerations of public interest or convenience intervene, each individual is answerable for any defamatory expressions he may think proper to use in reference to another, to the extent of the injury that other may have sustained, or to which he may in the ordinary course of events, be likely to be subjected—whether such expressions are honestly, but mistakenly put forth, or flow from express malice. He is bound to know whether the charge *he* makes is true or false in point of fact; and nothing but the most convincing proof of its truth can exonerate him from responsibility for its publication. If the *truth* of the charge can be established, the *motives* of the defendant in making it, are not

the subject of inquiry. When, however, any of the exigencies of society require or authorize him to give his *opinion*, in reference to the character or pretensions of another, upon the ground that such *opinion* may be of service to a greater or less extent to those who may have an interest in the question, the absolute *truth* or *falsity* of any allegation he may choose to make in the communication of that opinion, no longer constitutes the test upon which his responsibility is made to depend: but the *circumstances* under which the communication was made, and the *motives* by which he was actuated, become material questions for the determination of the jury.

The questions in reference to which the greatest amount of embarrassment has been practically experienced on the part of the profession as well as of the courts, are those which relate to the admissibility of evidence offered under the plea of the general issue, when accompanied, as it most usually is, with a plea or notice of special matter, especially in cases where the latter fails to constitute as set forth on the record, a complete answer to the action, or where the proof comes short of the allegations of the pleader. So far as the plaintiff's right to a recovery is concerned, the defence must then be conceded to be untenable: and the only object of the additional evidence must be to reduce the amount of damages to which he is entitled. The English case of *Knobell v. Fuller*, decided in 1797, is the leading authority applicable to this class of cases, and except so far as it allows proof of rumours and suspicions, lays down, as we conceive, a sound and rational rule by which the reception of this evidence is to be regulated, viz. that any evidence other than such as *would be a complete defence to the action*, under a plea of justification, or as would directly *tend to establish a justification*, and thereby to defeat the action altogether, is admissible in mitigation of damages. Nor does it seem to be material, in this view of the subject, whether a justification has or has not been attempted and failed. That fact may indeed operate to increase the verdict of the jury; it may, under certain circumstances, be regarded as proof not only of the original intention of the defendant, designedly to propagate the slander or libel, for the express purpose of injuring the character of the plaintiff, but of his determination to persist in it, until compelled by the irresistible force of the law and the facts to abandon the farther prosecution of such design; and in this view, it is the highest

possible evidence of express malice; or it may, in another aspect, be regarded as the strongest proof of honesty and sincerity in the propagation of the charge, provided it be abandoned the moment the error is discovered. But whether it amount to proof of express malice or not, it seems clear that it may be rebutted by proof going to establish the existence of mitigating circumstances attending the publication of the libel or the speaking of the words—of any pre-existing flaw in the plaintiff's character—or in short of any other matter which tends to show the absolute or comparative absence of malice on the part of the defendant, or to diminish the injury sustained by the plaintiff. We confess ourselves at a loss to understand, in this connexion, the precise principle upon which proof of the existence of *general suspicions and rumours* of the charge preferred against the plaintiff, *prior to the publication of such charge*, and not originating with the defendant, has been excluded by the courts. Such suspicions and rumours must necessarily have affected the character of the plaintiff to a greater or less extent, irrespective of any agency of the defendant; and to the extent that his character shall appear upon a full and fair investigation to have been so affected, ought the defendant in our judgment, upon principle, to have the benefit of the proof, in diminution of the damages which he shall be required to pay. But the rule is otherwise settled: and the question is no longer open for discussion. Although scarcely defensible upon its merits, no one can desire now to disturb it.

The nature and extent of the protection afforded by the law to *privileged communications*, especially those connected with the periodical press, in its claims freely to criticise the character and pretensions of authors whose literary productions are thrown into the great crucible of public opinion, have recently been very fully discussed before the courts of the state of New York, both at *nisi prius* and at bar, and are the subject of a very discriminating and able review in the introduction to the present edition of the work under consideration. We allude to what are familiarly known as the *Cooper libel suits*. The obvious discrepancy between the prevailing ideas of the law of libel, and the repeated results of prosecutions instituted against some of the most prominent conductors of the public press in that state, led, as the editor informs us, to a vigorous attempt, by legislative exposition of the law in reference to this

species of action, and of the rights of defendants, to cut the gordian knot of judicial construction: Judge Wendell, by dint of a patient and elaborate investigation of the whole subject, to which he was led as he tells us, by the existence of these futile struggles, to apply the efficacious remedy of legislative enactment to a case not requiring in his judgment so potential a course of treatment, has succeeded as we think, in unloosing the complicated folds with which the inattention of successive pleaders, and their omission to direct the attention of the presiding judges to the fundamental principles of the action, had involved the rights of defendants; and unless we are much mistaken in our estimate of the value of the results to which he has arrived, we predict a substantial harvest of public approbation as the reward of his researches in this interesting and fertile field of the common law.

It is at all events of the utmost importance, as well to the liberty as to the value and efficiency of the press of whatever grade, that its conductors should be fully aware of the extent and limitations of their rights and liabilities, especially in the department of literary criticism. We cannot however, avoid the expression of the opinion, that excessively refined and over-nice distinctions have been of late attempted to be maintained between the *productions* of a candidate for the public patronage and favour, and his *general character* as an author, or even as a man. The practical common sense of mankind repudiates these distinctions. We are uniformly accustomed, in the ordinary intercourse of society and the world, to "judge of the tree" *only* "by its fruits." We do not expect to "gather grapes from thorns, nor figs from thistles." We consider ourselves at liberty freely to discuss the personal failings of Burns and of Byron—the eccentricities of Johnson—the melancholy hallucinations of Cowper—and to take a strictly professional illustration, the deplorable obliquity of lord chancellor Bacon, whenever we are called upon to pass judgment upon their works. We associate the idea of personal excellence and purity of character with all our conceptions and illustrations of Scott, of Irving, of Wordsworth, of Hamilton, of Jay, or of Marshall; and we never hesitate to clothe our convictions on these points of private and personal concernment, in such words as we deem most suitable, pertinent, and appropriate. In short, we cannot separate the idea of the author from the consideration of his works;

nor can any arbitrary and conventional rule of law, contravene the constitution of our minds in this respect. The individual whose general private character as evinced by his outward deportment, (of course we do not claim the right of penetrating into the recesses of his household gods, or of investigating his private pursuits of business or of pleasure,) cannot abide the ordeal of the most searching scrutiny, ought not in these days of the supremacy of public opinion, to solicit the suffrages of that opinion, either with a view to fortune, fame or station.

We are thoroughly satisfied from the perusal of the work before us, that the principles which regulate the admissibility of evidence on the part of the defendant in actions for libel or slander, where all idea of justification, absolute or virtual, is explicitly abandoned, and where the avowed and only object is to reduce the amount of the recovery, are much more broad, liberal and comprehensive, than the recent interpretations of many of our courts would authorize us to infer; that in all issues of fact, to the *jury* and not the court, in *civil* as well as in *criminal* prosecutions of this nature, belongs the *exclusive right* to determine both the law and the fact: that where the broad shield of the general issue is interposed, no subsequent failure on the part of the pleader to construct a barrier sufficient to avert the attack of the plaintiff, will expose the defendant to the "pelting of the pitiless storm" of vindictive retribution, without the power of turning aside at least, some portion of its fury; that the conductors of the public press are protected in a fair and legitimate criticism of the character, pretensions, and productions of any individual who by copyright, *imprimatur* or otherwise, makes a *profert* of himself, as a candidate for the favourable suffrages of his fellow citizens; and that to admit the legitimate deductions arising from the recent decisions of some at least, of the *nisi prius* tribunals of our sister state, as the settled law of libel, would be to open the doors of this action to an extent as yet we trust undreamed of—to effect a revolution in the private fortunes of individuals, a transfer of funds from hand to hand—in comparison with which, the developments of the South Sea bubble, or of John Law's banking speculation, would sink into insignificance.

The series of notes by the editor, appended to the present edition of Starkie, embody the substance of the English and American cases

on the subject of libel and slander, subsequently to the publication of the preceding edition in 1830. In thus giving us the *principles* to be deduced from these decisions, and arranging them under their appropriate heads in the treatise, the editor has, we think, conferred a much greater benefit on the profession, than he would have done had he followed the example of some of his predecessors in grouping together a confused assemblage of cases imperfectly stated, and tending only to produce perplexity and embarrassment.

Upon the whole we have no hesitation in saying, that the present edition constitutes much the most perfect and complete exposition of the law of slander and of libel, from its earliest history to its present state, which is before the profession. The incidental discussions on the subject of malicious prosecution are extremely valuable; although they do not pretend and cannot be expected to constitute a systematic development of this action. The execution of the work reflects credit on the enterprising publishers; and the low price at which the two volumes are afforded, equal only to the ordinary charge for one, places them within the reach of every lawyer.

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QUARTERLY LIST OF NEW PUBLICATIONS.

Reports of Cases argued and adjudged in the Supreme Court of the United States—January Term, 1843. By *Benjamin C. Howard*, Counsellor at Law, and Reporter of the Decisions of the Supreme Court of the United States: Vol. 1: containing in an Appendix a List of all the Cases decided in that court from the earliest Reports to the present time. Philadelphia: T. & J. W. Johnson. 1843.

Reports of Cases decided in the Supreme Court of Judicature of the State of New Jersey, in May and September Terms, 1842. To which is annexed an Alphabetical Table of all the Cases contained in the 22 Volumes of New Jersey Reports. By *Josiah Harrison*, Law Reporter. Vol. 4. Camden, N. J. 1843.

A Treatise on the Law of Slander and Libel, and Incidentally of Malicious Prosecutions. "Nescit vox missa reverti." By *Thomas Starkie Esq.*, of Lincoln's Inn, Barrister at Law. From the second English edition of 1830, with Notes and References to American Cases and to English Decisions since 1830. By *John L. Wendell*, Counsellor at Law. 2 Vols. Albany. 1813.

Reports of Cases argued and determined in the Supreme Court and in the Court for the Correction of Errors of the State of New York. By *Nicholas Hill Jr.*, Counsellor at Law. Vol. 4. Albany: William & A. Gould & Co. 1843.

Reports of Cases argued and determined in the Court of Chancery of the State of New York. By *Alonzo C. Paige*, Counsellor at Law. Vol. 9. New York: Gould, Banks & Co. 1843.

Reports of Cases argued and determined in the English Courts of Common Law, with Tables of the Cases and Principal Matters. Edited by *Hon. Thomas Sergeant*, one of the Justices of the Supreme Court of Pennsylvania, and *Hon. Thomas M'Kean Pettit*, President of the District Court for the city and county of Philadelphia: Vol. XL., containing Cases in the Queen's Bench in Trinity and Michaelmas Terms and Vacations, 1840-41, and in the Common Pleas in Michaelmas Vacation, 1840, and Easter Term, 1841. Philadelphia: T. & J. W. Johnson. 1843.

An Analytical Digest of the Equity Cases decided in the Courts of the several States, and of the United States; in the Courts of Chancery and Exchequer in England and Ireland, and in the English Privy Council and House of Lords, since the year 1836. By *Oliver L. Barbour*, Counsellor at Law. Springfield, Massachusetts: G. & C. Merriam.

STEPHENS' NISI PRIUS.

CAREY & HART, PHILADELPHIA,

WILL PUBLISH IN NOVEMBER,

A TREATISE ON THE LAWS OF NISI PRIUS,

EVIDENCE IN CIVIL ACTIONS AND ARBITRATIONS AND AWARDS.

BY A. J. STEPHENS ESQ.,

BARRISTER AT LAW.

WITH NOTES AND REFERENCES TO AMERICAN DECISIONS,

BY GEORGE SHARSWOOD,

ONE OF THE VICE-PROVOSTS OF THE LAW ACADEMY OF PHILAD.

It is believed that this will be found a far more complete and comprehensive work on the subject than any in existence. The following is the preface.—The object of these pages is to supply the legal profession with a practical Treatise, not only upon the law of Nisi Prius, but also upon the subjects of Evidence in Civil Actions, and Arbitrations and Awards.

A desire having been expressed by several members of the profession in Ireland, that the Irish Common Law Reports should be cited, Alcock and Napier; Armstrong and Macartney; Batty; Cook and Alcock; Crawford and Dix; Fox and Smith; Hayes; Hayes and Jones; Hudson and Brooke; Jebb and Bourke; Jebb and Symes Jones; Jones and Carey; Longfield and Townsend; Ridgway, Lapp and Schoales; Smith and Batty; Smythe, and Fernon and Scriven, as well as Circuit Reports, have been consulted, and the decisions occurring in those authorities which seemed illustrative of Nisi Prius law, have been embodied in the work.

The "London Globe," remarks: This is the most valuable work of its class which has been issued from the press within our recollection.

And the London *Legal Guide* of December 27, 1842, thus speaks of the work:

STEPHENS' NISI PRIUS.—"An elaborate work upon the law of Nisi Prius, contained in no less than 3336 pages, royal 8vo.;—a task

entailing no small degree of labour to pronounce a just and honest opinion upon—looking at the author on the one side, and the profession on the other. It is a subject of vast interest to the pleader, the attorney, and the student. We can easily appreciate the great labour and anxiety of the author in getting up a work of such magnitude. It is voluminous; but we do not see that it could be brought within a smaller space, and give the same valuable information it now contains. As a book of common law practice, we consider it of high pretensions. It is arranged alphabetically, with preliminary observations descriptive of every subject. It is not a mere digest—such as those that have passed before it (and some of very uncertain authenticity). It contains not only the judgments of the most eminent judges upon every point of law, but also the evidence requisite for the plaintiff and defendant in each particular class of action, as well as practical observations upon the declarations and pleadings.

“It embraces the whole system of common law practice at this day; and as a whole, we think the book stands unrivaled, and when well known will become the standard authority upon every point in the wide range which it embraces. The price* will deter none of the profession from becoming purchasers; for when once acquainted with the valuable contents of this most important work, the ready facility it affords of advising promptly upon every ordinary case, either for attack or defence, the price must become a secondary consideration.”

TERMS.—The work will be handsomely printed on good paper in three volumes, royal octavo, of 1000 pages each, at \$5 00 per volume, neatly bound in sheep, or \$5 50 per volume, in calf, payable on delivery.

✂ Vol. 1 is now ready for delivery.

* The price of the London edition, in boards, is \$32 00.

A TREATISE
ON THE
LAW OF SLANDER AND LIBEL,
AND INCIDENTALLY OF
MALICIOUS PROSECUTIONS.

BY THOMAS STARKIE ESQ.
OF LINCOLN'S INN, BARRISTER AT LAW.

FROM THE SECOND ENGLISH EDITION OF 1830:

WITH NOTES AND REFERENCES TO AMERICAN CASES, AND TO
ENGLISH DECISIONS SINCE 1830.

BY JOHN L. WENDELL,
COUNSELLOR AT LAW.

2 VOLS.—ALBANY.

THE second edition of Mr. Starkie's Treatise is in itself a great improvement upon the first, and cannot fail to be acceptable to the profession. To the reprint here, are added the notes of the editor; a digest or reference to all the important British and American cases; and an introduction pointing out various discrepancies in the *law of libel* as held in England, and as it prevails here; particularly on the subject of privileged communications; the force and effect of the plea of the general issue in the action of slander as to the evidence admissible under it on the trial of the cause; the proper subject matter of a special plea, and the danger of attempting to plead specially facts which in their nature are not, and cannot be the subject of such plea; the evidence admissible in mitigation of damages, whether the general issue be or be not accompanied by a plea or notice of justification; and the right of the jury in all prosecutions for alleged libels, notwithstanding any direction given by the court, to determine both the law and the fact, in civil as well as in criminal cases. The introduction also contains a review of several of the libel cases prosecuted by *J. Fenimore Cooper* against the editors of newspapers in

the State of New York, questioning the correctness of the decisions of the courts of that state.

The work is for sale in Albany, New York, Boston, and Philadelphia.

Extracts from letters to the Editor.

From Chancellor Kent.—“I have perused your edition of Starkie on Slander and Libel which you was so kind as to send me, with great pleasure. It is a work neatly got up and admirably edited. I have read carefully your introduction, and all your notes to the work. Your review of the New York cases in your introduction is accurate, fair and just; and I am satisfied that the decisions in the Cooper cases cannot be sustained, and that the matters offered in explanation and to rebut the malice, ought to have been received in evidence and gone to the jury, whose province it is to judge of the *quo animo*, and of all proof going to repel the presumption of malice. I think you have done great good to the law and the profession by your manly exposition of the law in these libel cases.”

From Judge Story of the Supreme Court of the United States.—“The original work I esteem a very valuable and useful one, and you have greatly increased its value and utility by your learned and important notes. I have read your introduction with great interest and some surprise. I was not previously so fully aware of the deviations of the New York courts from the English doctrines on the subject of libels and slander, as you show them to be.”

From Simon Greenleaf LL.D., Professor of Law in the University of Cambridge.—“I pray you to accept my sincere thanks for the copy of Starkie on Slander which you were so kind as to send me. I have delayed this acknowledgment till I could find time to read the introduction, which I have now done; and deem it a very successful vindication of this branch of the law, from the reproach cast upon it by erroneous decisions. I have long been of opinion, that as malice express or implied is essential to the action, so the degree of blame is equally essential to the due estimate of damages; unless it be a

rule of law (which we are yet to learn,) that in estimating damages in cases sounding in tort, and in pure torts, the jury are to exclude all consideration of motives, intentions and circumstances: giving to the all-but-guilty plaintiff the same damages as to the most innocent and deserving; and inflicting on the all-but-faultless defendant the same punishment as the most flagitious would deserve. At any rate, it is as fair to inquire in slander as in trespass, how much of the damage has been wilfully caused by the defendant, and how much the plaintiff has justly brought upon himself."

From the Hon. Roger M. Sherman, late one of the judges of the Supreme Court of Connecticut.—"Accept my thanks for the volume of Starkie on Slander with which you have favoured me. The utility of this work will I trust, be much enhanced in this country, by the notes which you have annexed to it, embracing many American authorities. I have read your introduction attentively, and consider the principles you advance as correct."

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AMERICAN LAW MAGAZINE.

NO. 4.

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ART. I.—SKETCH OF THE CHARACTER AND GENIUS OF HUGH S. LEGARE.

[The following article from the pen of the Hon. William C. Rives, was published originally in the Southern Literary Messenger. As a strong desire has been expressed for its republication in a more permanent form, in one of our Judicial Reviews, the editors very gladly give a place to it.]

I OBSERVE with sincere satisfaction, in the last number of the Messenger, that you invite for its columns a fitting notice of the character of the distinguished man, whose recent loss, under circumstances alike imposing and affecting, the nation has been called to deplore. It is a homage most appropriately due from the patriotic literature of the country to the memory of one who, always a zealous worshipper at its shrine, has done so much to assert its dignity and illustrate its usefulness, in connexion with the highest pursuits of social and active life. The theme demands a pen, which has other qualifications than those which an ardent and devoted friendship alone can supply, to do justice to it in all the breadth and elevation

of its moral dignity and grandeur. But there are some reflections growing out of the recent death of H. S. Legare and the national mourning which has followed it, that even an untutored hand, under the instinctive guidance of the heart, may be excused for attempting to present.

The first observation which occurs to the mind in contemplating this lamented event, is one which, out of the very depth of the public affliction it has occasioned, brings forth solid encouragement to every sincere and honest patriot, and is full of instructive lessons to the generous and aspiring youth of the country. All must have remarked, and many not without surprise, the loud and universal acclaim of mingled sorrow and praise which followed to the tomb one, whose habits and tastes through life, cherished the privacy of studious retirement—who, far from courting, shunned the public gaze, except when an imperious sense of duty brought him before it—who never cultivated popularity, however he esteemed it when the reward of virtuous actions—and who, from his inmost heart despised, as in his lofty and burning eloquence he was ever wont to brand, the unworthy arts of the demagogue. The man thus honoured and lamented in his death, was neither the favourite nor the nursling of party. He had, indeed, gravely offended the spirit of party, on more than one occasion, by the independence and conscientious integrity with which he pursued the convictions of his own judgment, where he believed the interests of his country at stake. As a consequence of this inflexibility of principle, as well as of his retiring and unobtrusive personal habits, his career while living, had not been attended, in a degree corresponding to his rare endowments, with all those external evidences of public consideration, which his friends, who, in the unreserved freedom of private intercourse had been able to sound the depths of his genius and resources, well knew he merited. Such, however, is the winning power of virtue and talents, even when separated from the ordinary accessories of party popularity, that he was daily, though silently, growing in the

sober esteem and confidence of the country; and when, at length, the hand of death arrested him in the noble path of his usefulness, the national appreciation of him, which had been lying comparatively dormant, though all the while warming the hearts of a generous and enlightened people, suddenly burst forth in one general symphony of lamentation and exalted praise.

Let all who engage in the service of their country, with elevated views and conscious powers of usefulness, take courage from this example. Sooner or later, the reward of public approbation and gratitude will infallibly crown every career, which rests its solid and imperishable titles on "the pursuit of noble ends by noble means." Let no feverish anxiety for a spurious and fleeting notoriety, lead the aspirant for public esteem to put his trust in specious arts, superficial attainments, or accommodating suppleness, as available substitutes for that laborious and vigorous training and application of the faculties, moral and intellectual, by which only a genuine and enduring popularity can be won. Let him equip himself for the stern conflicts of public duty from the armory of knowledge and virtue, where only weapons of the true temper for such a warfare are to be found, and not go forth to battle in the mimic accoutrements of the toy shop. Let him not indulge an undue solicitude to *obtain* popularity. Let his aim rather be to *deserve* it. Let him exhibit in superior knowledge and acquirements—in the diligent and untiring cultivation of all the capacities of a high public usefulness—in noble and elevated principles of action, the authentic *credentials* of his mission to serve his country; and his country will, in time, call for and honour him, or, if she does not, the loss will be hers, not his.

The example addresses itself with equal emphasis to the gifted youth of the country, who have not yet entered on the arena of active exertion, but who are looking forward with generous aspirations, from the silence and discipline of their academic retreats, to the part they are hereafter to act upon the busy stage of life. The desponding sentimentality of the

poetic muse, or rather the dangerous sophistry of that *improba siren desidia*, the natural indolence of man, is not unfrequently invoked to discourage a manly and strenuous ambition, by portraying, in funereal colours, the ultimate vanity and fruitlessness of all human pursuits. We are sometimes asked, in the misapplied language of unreasoning elegy, why "scorn delights and live laborious days" in the vain pursuit of fame; seeing that,

—— "the fair guerdon, when we hope to find,
And think to burst out into sudden blaze,
Comes the blind Fury with abhorred shears,
And slits the thin-spun life!"

But the only fame, which a true ambition is capable of coveting, is one which "the abhorred shears of the blind Fury" have no power to destroy. It survives the stroke of Fate, and flourishes beyond the grave. It is that amaranthine plant which the same immortal poet tells us, "lives and spreads aloft" to Heaven, and is but its anticipated judgment on the deeds of men. It is that fame which alone Legare sought, and which he achieved—with what glorious and enviable success, let the according praises and regrets of a whole nation testify. What other fame is worthy to engage, for a moment, the concern of a being, whose life on earth, when longest, is limited to a span! To live in the hearts and memory of our countrymen, when we ourselves shall have passed from among them, is, on the other hand, an object in harmony with the highest aspirations of the human soul, and fitted to elicit the noblest faculties of our nature. In the distinguished and now hallowed example before us, let the enlightened and patriotic young men of America read, for their encouragement, amid the daily and nightly toils of their probationary discipline, the pledge of their own high destinies, if by the same means they shall devote themselves to the same noble ends.

The extraordinary powers and varied attainments of the late attorney-general, were the product of early and incessant culture, and of untiring industry and labour. How else could

such rare excellence, in so many different departments of human talent and knowledge, have been acquired; for he was *primus inter pares* in all—a finished scholar, a consummate orator, a profound lawyer, an able and accomplished statesman. No felicity of genius, however great, no fecundity of nature, however teeming, could account for such intellectual riches, without the creative energies of constant and unwearied diligence; for it is a truth, as applicable to the philosophy of mind as to the science of political economy, that *labour* is the true and only source of either mental or material wealth. No paltry vanity of natural endowments ever prevented Mr. Legare from bearing earnest and instructive testimony in his discourse, as he exemplified so strikingly in his practice, the truth and value of this grand *arcanum* of all sound superiority and success.

Having enjoyed in early youth, the advantages of a finished education in the best schools of his own country and of Europe, he continued, through all the avocations and active employments of his future life, the same habits of diligent and enthusiastic study by which he established, from the first, a marked pre-eminence among his companions. He was so smitten with a sympathetic appreciation of the great Roman orator's noble panegyric of letters, that he literally fulfilled in his daily habits, (without any such purpose, certainly, as that of mere pedantic conformity,) the picture of their attractions so graphically delineated in the latter part of that celebrated passage—*Hæc studia, &c., delectant domi, non impediunt foris, pernoctant nobiscum, peregrinantur, rusticantur*. His books were his inseparable companions, whether at home or abroad—they passed the night with him, they travelled with him, they accompanied him in his occasional rural retreats. A jealous economist of time, and particularly attentive to husband those odd fragments of leisure which irregularly intervene in the routine of daily employment, and which by most persons are thrown away as useless, he was more fortunate even than the ancient philosopher who reproached

himself with the loss of one day in the course of a long life. Legare never lost an hour; for however small the interval of time which fell upon his hands unoccupied by the necessary demands of business, or the cherished society of a chosen circle of friends, it was never wasted. A book, a pen, or a train of thought to be resumed, was always at hand to absorb and employ it usefully; for so perfect was the discipline of mind he had established, through long habits of industry and study, that he turned his attention at will, to whatever subject seemed, at the moment, fittest to engage it.

As a scholar, he stood without a rival among the public men of America of his day, and if, even in that class of learned men who make the cultivation and pursuit of letters the sole business of their lives, he had any superior in scholarship, it would be difficult to say who that superior was. His acquaintance with the great writers of antiquity, the master minds of Greece and Rome, was intimate, thorough, and familiar—placing at his ready and perfect command all those hidden treasures of thought, philosophy, and wisdom, all those exquisite models of taste, eloquence, and power, which lie enshrined in their immortal works. In the languages and literature of modern Europe he was perfectly at home. He not only read, but wrote and spoke the languages of France and Germany with the ease and elegance of a native, and was profoundly versed in their history and literature. He had explored, with particular industry and success, the rich mines of learning and historical *discovery* (so to speak,) which the acute and recondite researches of modern German writers have opened, and enlarged his own accumulated stores by the superaddition of the fruits of their valuable labours. With all this affluence of intellectual wealth, he made no ostentatious display of his acquisitions. They were assimilated into the solid nutriment of his own mind, and their effect was seen rather in the enlarged scope and vigour of his conceptions, than in any exhibition of mere learning.

As a speaker and writer, the style of his eloquence was

ornate and rich. But, like the gorgeousness of Burke, this was the unbidden effect of the irrepressible exuberance of his genius. No one despised more than he did the mere glitter of words, or held in lighter esteem the studied arts of the professed rhetorician. Whatever was the elevation and richness of his diction, it was uniformly supported by a corresponding richness and elevation of thought. The stream of his eloquence was fed from copious and inexhaustible fountains, and its majestic current fertilized and fructified, even when it inundated its banks.

His character and abilities, as a profound and accomplished jurist, have been already given to the world under the seal of the highest authority. To the question, was he *an eminent lawyer*, judge Story, in his beautiful and touching address to the law school at Harvard, while the funeral bells of Boston were yet tolling the knell of his departed spirit, answered emphatically and unhesitatingly—"no man was more so." And certainly, if a profound acquaintance with the most renowned systems of ancient and modern law, with the common law of England, the civil law of Rome, the codes of France and Germany, added to a familiar knowledge of the laws and constitutions of our own country and a thorough indoctrination in the principles of universal jurisprudence, can make an able and accomplished lawyer, Legare was such. All this breadth and scope of knowledge, however superfluous it may be deemed for the lawyer who, to use the words of Cicero, is nothing more than *leguleius quidam cautus, et acutus præco actionum, cantor formularum, auceps syllabarum*, was necessary to fill Mr. Legare's conception of the character of a great lawyer, worthy of the name, and of a calling which boasts its rank among the *learned professions*. One of the great secrets of his superiority was to place ever before him the highest standards of excellence, in every department, as the *beau idéal*, at least, which a true and lofty ambition should aim to approximate as near as possible, if not able fully to attain. His idea of the nobleness and

grandeur of the law, in its true dignity, was that which Bolingbroke has so justly and eloquently portrayed, and his impersonations of that idea were the Bacons, the Clarendons, the Somers, the Mansfields of England,—the Marshalls, the Pinkneys of America.¹

The narrow and unworthy prejudice against learning, as incompatible with professional eminence, which has been so properly rebuked by judge Story, sometimes ventured to question the claims of Mr. Legare to the character of an able lawyer, on the very ground of his acknowledged pre-eminence in the attainments of elegant literature. The same Gothic prejudice, we learn from contemporary memorials, boldly called in question the legal abilities of lord Mansfield, and was humorously satirized at the time, in some lines of Pope, in which the poet represents two heavy sergeants of the temple, "who deemed each other oracles of law," exulting, with a grave self-complacency, in the fancied profoundness of their own *legal* attainments, while

"Each shook his head at Murray as a wit."

And yet this Murray rapidly rose through all the gradations of professional eminence, to the chief justiceship of the king's bench, in which court he presided with unrivalled lustre and

¹ In his letters on the study of history addressed to lord Cornbury, the great grandson of the earl of Clarendon, Bolingbroke, after speaking of the profession of the law as "in its nature the noblest and most beneficial to mankind, in its abuse and debasement the most sordid and the most pernicious," makes the following remarks, admirable alike for their eloquence and truth. "There have been lawyers that were orators, philosophers, historians,—there have been Bacons and Clarendons, my lord. There will be none such any more, till, in some better age, true ambition, or the love of fame, prevails over avarice, and till men find leisure and encouragement to prepare themselves for the exercise of this profession by climbing up to the 'vantage ground,' so my lord Bacon calls it, of science; instead of grovelling all their lives below in a mean, but gainful application to all the little arts of chicanery. Till this happen, the profession of the law will scarce deserve to be ranked among the learned professions; and whenever it happens, one of the 'vantage grounds' to which men must climb, is metaphysical, and the other historical knowledge."

ability for thirty-two years, having been thrice offered also the great seal of lord chancellor; and such was the almost miraculous infallibility displayed by him as a judge, that, out of the numerous decisions rendered by him during that long period of time, but two or three of his judgments were ever reversed, and about an equal number of instances occurred in which any of his brethren differed in opinion from him. With such an illustrious example before us, we shall be slow to believe that the superior literary accomplishments of Mr. Legare were likely to prove a hindrance to him in the path of professional reputation and success, or to prevent him from fulfilling his destiny, in becoming one of the chiefest glories of the American bar.

As a statesman, the merits and talents of Mr. Legare were of the very first order. He early conceived the noble ambition of usefully serving his country, not to gratify a selfish vanity, or to promote any private or personal end, but from a true filial devotion to her glory, and from a generous and magnanimous desire to bear his part in upholding the honour and success of her *model* institutions. His whole training was one of admirable preparation for this high career. There is no branch of knowledge proper to an American statesman, in which he was not a profound adept. He had thoroughly studied the genius of popular government, as well in its essential principles, as in all its great historical examples. With what sagacious and discriminating research he explored the history and institutions of the master states of antiquity—the republics of Greece and Rome—he has given to the world proud and enduring evidence, in writings which will long survive him, and which posterity assuredly “will not willingly let die.”¹ He had traced and meditated, with equal diligence and care, the progress of civil and political liberty among our

¹ Two most able and learned tracts, one on the constitutional history of Greece and the democracy of Athens, the other on the origin, history, and influence of Roman legislation, are here more particularly alluded to.

British ancestors; and all those great social and political revolutions, which have changed the face of modern Europe, were alike familiar to his mind, in their causes, incidents, and results, and with all the monitory and instructive lessons with which they are so richly fraught. With these preparatory lights, he made our own peculiar, happy, and complicated system of popular and federative government, the subject of his profoundest study, and was as deeply imbued with its spirit, as he was thoroughly initiated in its principles, and familiarly conversant with its constitutional action. To these primary qualifications of all true American statesmanship, he added that enlarged knowledge of the sound principles of political economy, and of the fundamental laws of trade, currency, revenue, and finance, which are indispensable guides to enlightened practical legislation. With the public law of nations, which regulates in peace and in war the mutual rights and duties of civilized and independent states, the diplomatic position he had filled abroad with so much honour to his country and to himself, no less than his early studies, made him intimately acquainted; and to crown all these civic accomplishments and advantages, he had enjoyed the precious opportunity of observation and experience amid the largest scenes of human affairs, in foreign countries as well as his own.

When Mr. Legare, therefore, came into congress, he came clad in complete armor. The speeches and reports made by him during the brief period of his service there, show with what fulness of information and knowledge he came into the discussion of every question in which he took a part—enriching it with the widest amplitude of illustration—judging it with the utmost maturity of thought and wisdom—while adorning it with the graces of a finished and captivating eloquence. But his career there was permitted to continue two years only, leaving the nation to regret the premature loss, from its legislative councils, of the rare and eminent abilities and statesmanship of which, in so short a time, he gave such abundant and unequivocal proofs.

The splendour of his genius accompanied him in his ostracism, and illuminated the obscurity of his retreat. He was soon called back, to take a prominent position in the executive government of the country, for which he was pointed out solely by the consideration of his superior fitness; for he never sought office, and his friends deemed too highly of him to believe that any office was capable of adding to the intrinsic dignity of his talents and worth. This new sphere of duty elicited new proofs of his varied powers and attainments, and developed comprehensive faculties of public usefulness, co-extensive with and equal to every demand of the public service. Besides the able and distinguished discharge of the duties which more particularly belong to the post he occupied, which received the united testimony of the most enlightened judges and of the general voice of the country, he brought to the aid of the government, on every great question of national interest, a fund of knowledge, a clearness of views, and a promptitude of decision, which could not fail to be sensibly felt and appreciated. When unexpectedly called to fill the leading executive department, it is not unreasonable to suppose, and it is hoped the suggestion may be made without offence, that none of the able and distinguished men who have filled it, upon their first introduction to its duties, probably ever felt more at home among its high and imposing concerns, than did Mr. Legare—excepting always with the profound reverence so especially their due, those great minds of *revolutionary schooling* which grew up along with the thorny and difficult questions of our international relations, and which laid deep the foundations of our foreign policy and public law. The records of the state department during the short but busy month his life was spared to stamp the lasting mark of his genius, industry, and abilities upon them, will show whether this suggestion may not find in its verisimilitude some excuse for its temerity.

It is not a little remarkable that Mr. Legare was doomed sometimes to encounter the same scepticism, in regard to his

practical abilities as a statesman, which had thrown unavailing doubts on the solidity of his legal attainments, and from the same cause. The extraordinary polish and brightness of his weapons, however massive, seemed to raise suspicions of their strength and durability. The very superiority of his qualifications inspired distrust of their reality. So the great Roman statesman and orator, whom Mr. Legare especially resembled in the broad and elaborate foundation of general learning on which he raised the superstructure of his political talents and usefulness, was pointed at, when he made his appearance on the public stage, as the *Greek* and the *scholar*. Yet this did not prevent him from exhibiting such consummate proofs of practical statesmanship, in circumstances of the most complicated difficulty and danger, as no man ever surpassed, and which procured for him, by a solemn decree of the national gratitude, the title of the *father of his country*.

But eminent as were the intellectual powers and accomplishments of Mr. Legare, they formed by no means the most distinguished part of his public character. It was the high moral tone so visibly impressed on all his actions; his disdain of every thing low and mean and narrow, the commanding elevation of his principles and views, the lofty spirit of personal honour, the magnanimous courage and self reliance of conscious virtue, which made him truly great. What the greatest of Irish orators so impressively said of the first of British statesmen, with suitable modifications, may be justly said of Legare. "No state chicanery, no narrow system of vicious politics, no idle contest for mere party victories, regardless of principle, ever sunk him to the vulgar level, of the so called great;" but resolute, conscientious, undaunted and unseduced, his object was ever the glory, liberty, and happiness of his country—his means were truth, integrity, patriotism, and honour.

A character, thus marked by the prominent and dazzling traits which enlist public admiration and applause, was set off by all those milder, but not less winning qualities which inspire affection and esteem, and which give to human life its

highest charm, and sweetest attraction. He was the delight and the ornament of the society he frequented. The spirit and brilliancy of his conversation were unremitting and unsurpassed. His manners were of the most perfect tone, uniting the dignity and elegance of the gentleman with the cordiality and playfulness of the companion and the friend. He had cultivated, with no small success, a taste for the fine arts, whose happy influence it is to humanize and soften, without enervating the character. But above all, his heart was warm, noble, generous, and true, despising every form of indirection and meanness,—embracing, with the strong affinities of a kindred spirit, whatever was lofty in principle, magnanimous in sentiment, or virtuous in action—entering, with the warm and unrestrained effusions of childhood itself, into the lovely sympathies and affections of domestic life,—and in friendship ever firm, faithful, and devoted. But reminiscences such as these, are too intimately connected with a yet bleeding sense of an irreparable personal loss, to be obtruded upon the public eye; and the sacred curtain, which the hand of an awful and mysterious providence has let fall upon the cherished hopes and affections of the heart, must remain farther undisturbed.

R.

**ART. II.—A LIST OF THE VARIOUS REPORTERS,
ARRANGED IN ORDER OF TIME, WITH REMARKS,
&C.**

[This article in the following pages owes its origin to the author's having had occasion, a year or two since, to arrange a law library of some size. He was obliged, of course, to ascertain the chronological sequence of the reporters: And a part of his commission being to supply all vacuities in the series, *as far as a limited amount of funds would do so*, he had likewise to inform himself of the comparative merits of the reports; lest, otherwise, he might pay extravagant

price for volumes which were now "scarce, for no reason, perhaps, than because they had been always worthless."

Thus noting what memory or reading happened to supply, his MS. increased to some size; and the editors of the *American Law Magazine* having thought that the tract might prove useful to persons desiring to arrange or complete their reporters, it has been delivered, with a few additions, to the printer of that journal.

Should the studious reader have occasion here and there to doubt whether the dates assigned to some of the early reporters possess severe exactitude, he must be pleased to remember, that many of those reporters arrange their cases, not chronologically, (as is now usual,) but according to the alphabet, omitting the year; and thus, that after the inquirer may have read every line of their gigantic tomes, he may yet remain in doubt as to the exact term embraced by the volume. In fact, a person who has never undertaken a chronological arrangement of these reporters, would scarcely believe how difficult is the task. And if they who have most examined the subject of the dates, have been least conscientious in opinion of them, it would little become the author to suppose that he had obtained an accuracy which is perfect. W.]

JENKINS. EX., CH., & IN ERROR.

4 HEN. III.—31 JAC. I. (1230—1633.)

JENKINS was a contemporary of Coke, and compiled these reports, (or centuries, as he calls them,) during the civil wars between Charles and the parliament. The volume is, of course, more in the nature of a digest than of reports; but it contains several cases not found in any other work. The author, who was a Welsh judge, was a dauntless adherent to the king, and on this account was put into the tower and Newgate by order of the long parliament.¹ It was in prison

¹ An interesting account of judge Jenkins is found in Mr. D'Israeli's *Commentaries on the Life and Reign of Charles the First*. Vol. 5, p. 110. Lond. 1831. "A mighty Athlet," says D'Israeli, "in the vast arena of the first English revolution, was one of our greatest lawyers; whose moral intrepidity exceeded even his profound erudition in the laws of our constitution. . . . Judge Jenkins takes no station in the page of our historians; yet he is a statue which should be placed in a niche." He was brought before the parliament for the loyalty of his conduct; who, dreading to execute a man in whose learning and honesty the nation had such confidence, offered to settle a pension upon him if he would acknowledge their authority. But the judge treated this proposition with scorn; and so defied martyrdom, that after the day had been named for his execution,

that he composed his centuries, and it is to the hard treatment which he had received that he refers in the preface to them. "They were written," he says, "amidst the sound of drums and trumpets," when he was "broken with old age and confinement in prisons, where his fellow-subjects, grown wild with rage, had detained him for fifteen years." Notwithstanding the inconvenient chambers in which the venerable judge composed this memorial of his learning, it is a work of admitted accuracy, possesses very considerable authority, and is frequently cited in the older books.

YEAR BOOKS. (K. B., C. P., EX., & ASSIZ.)

1 ED. I.—28 HEN. VIII. (1307—1537.)

VOL. I. OR PART I. 1 ED. II.—1 ED. III. (1307—1328.)

Only a few cases reach back so far as Edward I., and are in the exchequer. The style of reporting which marks this volume is quite unlike that of modern days. The report

one of the members rose, and moved that the house should "suspend the day of execution, and in the mean time force him to live in spite of his teeth." "I will tell you," said he, in speaking of his execution to one of his friends, "all that I intend to do and say at that time. First, I will eat much liquorice and gingerbread to strengthen my lungs, that I may extend my voice near and far. Multitudes, no doubt, will come to see the old Welsh judge hanged. I shall go with venerable Bracton's book hung on my left shoulder, and the statutes at large on my right: I will have the Bible with a ribbon put round my neck, hanging on my breast. . . . All these were my civil counsellors, and they must be hanged with me! So when they shall see me die, affirming such things, thousands will inquire into these matters; and having found all I told them to be true, they will come to loath and detest the present tyranny." Jenkins was the author of the well known treatise, *Lex Terra*, written against the proceedings of the "rebellious long parliament;" and which is recommended as "very reasonable to be perused by all such as would not be deluded by the unparalleled arbitrary proceedings and seditious pamphlets of this licentious and ingrateful age." It adds to our respect for Jenkins that he had strongly opposed, and, as he says, "detested" the ship-money and monopolies. He would retrench the royal power when stretching itself beyond the law; but when the king was to be stripped of his whole prerogative, with the same resolution he vindicated the violated law of England.

seems to be almost an exact transcript of whatever was said or done in court during the trial of a cause, and often ends with the statement or argument of counsel, (being as far as the case was proceeded in during the first day,) without the least mention of what became of it finally. This of course gives to the report a mutilated aspect, and an air of dramatic starchiness not very inviting to a modern reader.¹

VOL. II. OR PART II. 1 ED. III.—11 ED. III. (1328—1338.)

This volume contains a continuous and well reported series during the term mentioned; after which there is a chasm till we come to the next volume, a term of seven years. It appears, however, from the return of the inner temple to the commissioners appointed by parliament some years ago, to inquire into the MS. records of the kingdom, that there still exists in the library of the inner temple, a chronicle of the judicial proceedings during this interval. A MS. in the temple collection embraces exactly the deficient term; is said to be very fairly written in a coeval hand, and upon examining the tenth year with the printed copy, the two appear to be so nearly alike as to induce the belief that the MS. for that year was used in the printed edition.

VOL. III. OR PART III. 17 ED. III.—40 ED. III. (1344—1367.)

This volume contains only the following years, to wit: the 17th, 18th, 21st, 22d, one term of the 23d, the 24th, and so on till the 30th inclusive: then come the 38th and 39th, which close the book.

VOL. IV. OR PARTS IV. AND V. 40 ED. III. AND 1 ED. III. TO 1 RICH. II. (1367 AND 1327—1378.)

Part IV. contains reports from the 40th to the 50th Ed. III.; and is commonly called *quadragesms*, from the year in which the book begins. Part V., called the *liber assizarum*,

¹ 2 Reeves 357.

contains crown cases in every year throughout the reign. These two parts are much preferred to the two preceding volumes in this reign: they are more clear, more precise; and the cases occasionally turn upon points of law whose interest has in some measure survived to the present day. Still the whole of Part IV. is filled with everlasting discussions about the forms of writs and pleadings relating to real actions; and now that such actions have fallen into oblivion, the volume must be regarded more as a memorial of acuteness and diligence uselessly preserved, than as a work of any practical value.

VOL. V. OR PART VI. 1 HEN. IV.—1 HEN. VI. (1399—1423.)

The year book of Henry IV. is complete, and contains cases through fourteen consecutive years. The year book of Henry V. wants the 3d, 4th, and 6th years. Both parts, in style and also in the subjects, are more interesting than any of the preceding books; but in point of judicial learning, were thought by sir Matthew Hale not to arrive near the perfection of those in the last twelve years of Edward III.¹ It is probable, however, that the majority of readers in this day will be content to take their knowledge of the judicial administrations in these reigns from the same source as the great duke of Marlborough is said to have got all that he knew of the military history of England during the same period.²

VOLS. VI. AND VII. OR PARTS VII. AND VIII. 1 HEN. VI.—1 ED. IV. (1423—1462.)

From this date the year books begin to be more suited to the taste of modern readers: the statement of the case is more

¹ 3 Reeves 254.

² "In what history did your grace find that incident?" said Burnet to the duke of Marlborough, on hearing him quote some anecdote concerning the wars of York and Lancaster, which was new to the bishop. "In Shakespeare's plays," answered the victor of Blenheim; "the only history of those times I ever read."
—Sir Walter Scott, (*Crit. and Mis. Essays*, vol. iii. p. 13.)

full; questions of law are more thoroughly discussed, and the opinions of the judges are given more at large. The second part of Henry VI. is particularly esteemed. The series is incomplete; the 5th, 6th, 13th, 15th, 16th, 17th, 23d to the 26th, and the 29th years-being wanting.

**VOLS. VIII. AND IX. OR PARTS IX. AND X. 1 ED. IV.—1 ED. V.
(1482—1484.)**

Annals or reports *tempore* Edward IV., and in the fifth year of the same king. This last part is commonly called long. quint; and all the parts, particularly the last, are said by Mr. Reeves to be "full of excellent learning."¹

VOL. X. OR PART XI. 1 ED. V.—28 HEN. VIII. (1484—1537.)

This volume presents only an interrupted series, containing the 1st year of Edward V., the 1st and 2d of Richard III., from the 1st to the 21st of Henry VII., omitting the 17th, 18th, and 19th years; while the only years of Henry VIII. are the 12th, 13th, 14th, 18th, 19th, 26th, and 27th.

It is observed that in the year book of Henry VII. we find the judges and counsel sometimes quoting cases, and that Bracton is referred to. The year book of Henry VIII. is said to be inferior to any of the year books which precede it; a fact which is attributed to the very sufficient cause, that the stipend which had been paid in former reigns was dropped in the time of Henry VIII.

When the year books were reprinted in 1678, they were recommended by lord Nottingham and the other judges "to the students and professors of the law, as a principal and essential part of their study;" but so completely have they been swept in wreck by "time's ungentle tide," that in *Seymour v. Barker*,² when sergeant Williams cited a case from 7th Edward III., Mansfield c. j., told the sergeant, that it was "a

¹ Vol. iv. 112.

² 2 Taunt. 200.

great way to go back for a precedent;" while Mr. justice Heath irreverently exclaimed: "come to modern precedents, something within three hundred years!" But the judges of the king's bench would seem to regard them more dutifully; for in *Vyvyan v. Arthur*,¹ a precedent was quoted from this same reign, and being in point, ruled the case. So in *Outram v. Morewood*,² lord Ellenborough greatly relied on the year books; and we even find them quoted in our own country so lately as 1837, in a local court, on a question relating to the law of Pennsylvania.³

It is well known that there exist in the Lincoln's Inn, Middle and Inner Temples, Hargrave, Harleian, Lansdowne, British Museum, and other MS. collections in England, very many volumes of yet unpublished reports. It is to copies of these, probably, that reference is made in those constant citations by courts and counsel prior to the present century, "of a MS. note of that case which I have:" and to the same source we may presume that Coke refers when citing Spelman's, or, as he sometimes writes it, Spilman's reports.⁴ And Dyer, when quoting such reporters as Tanfield, Warberton, Harper, Turner, Randal, Mason, Rhodes, and others, none of which are known to exist in print.⁵ A considerable

¹ 1 B. & C. 415. ² 3 East 346. ³ *Bujac v. Phillips*, 2 Miles 73.

⁴ 2 Inst. 49, 50, case of Anne Boleyn; 3 Inst. 17, 121, 126.

⁵ In the same way, perhaps, Milton, who in one of his sonnets to Cyriac Skinner, addresses him as

"Cyriac, whose grandsire, on the royal bench
Of British Themis, with no mean applause
Pronounced, and in his volumes taught, our laws."

Neither Tod nor that more faithful inquisitor into the ashes of departed greatness, sir Egerton Brydges, appears to have been able to ascertain to whom Milton here refers. If the person in question bore the name of his descendant, his writings cannot have been printed; for the volume now known as Skinner's reports belongs to a date much posterior. However, there is no record of any English judge of the name of Skinner, for many years anterior to Milton's day. The ancestor may have been maternal. In 12 Viner 137, (*lady Jones v. lord Say*.) there is a reference to *Wiseman's* reports, and in Coke Littleton 290 a, a reference by lord Nottingham to *Egerton's* reports. I have likewise somewhere seen a reference to *Hyde's* reports.

number of these MSS. have belonged to eminent lawyers, by whom they appear to have been regarded with a high degree of professional pride. Sir Matthew Hale, who bequeathed his to the society of Lincoln's Inn, says of them in his will: "They are a treasure worth the having and keeping; which I have been near forty years in gathering with very great industry and expense. They were fit to be bound in leather, and chained and kept in archives. I desire that they may not be taken out or disposed of." See also the preface to Ridgeway's cases, where the history of a MS. is given for some generations. These various MSS. have been from time to time the subjects of parliamentary commissions, and have been carefully examined, collated, and arranged by eminent lawyers, under direction of the several inns of court, universities, and other public institutions which own the collections. And it is said that nearly all the chasms and most of the imperfections existing in the early reports, can be supplied by them.¹ The commissioners have strongly recommended a new and complete edition of the year books; and should the books be well translated, the folio reduced to the octavo size, the Gothic supplied by the Roman letter, the whole enlightened by a full and well digested index, and, finally, presented upon clean white paper, so as to have the advantages of a modern style, we may safely say, that they would be as intelligible as some of the more recent reports. Unlike most of the reports which succeeded, the year books, it is well known, possess the highest authenticity. To the profession they are in some sort the *gentis incunabula nostræ*; while to the historian they could not fail to afford a minute, entertaining, and very authentic portrait of English medieval customs and man-

¹ Thus the whole of Ed. I., except the few exchequer cases, is wanting: also in Ed. III., *anno* 11 to 16, 19, 20, 31 to 37. The whole of Richard II. Of Hen. V., the 3d, 4th, and 6th years. Of Hen. VI., the 5th, 6th, 13th, 15th, 16th, 17th. Of Hen. VII., the 17th, 18th, and 19th. These same sorts of chasms occur in many of the subsequent reporters; so frequently, indeed, and so irregularly, that they are not always mentioned in the present tract.

ners. Still we must admit, that even the best of the existing editions are printed so closely, and in such elephantine form; so many of the court-hand abbreviations retained; so little separation into paragraphs, or distinction between what is said by the bench and what at the bar, that by any but a legal antiquary, the year books are not easily understood; that much of their learning has long since passed, with the persons who possessed it, to "the land where all things are forgotten," and that, in short, though they will occasionally be consulted, they will never again, in their existing form, be read.

BELLEWE'S CASES T. RIC. K. B., C. P.

1 RIC. II.—23 RIC. II. (1378—1400.)

These cases are collected principally out of Statham's abridgment, and must not be confounded with another volume of Bellewe, *temp. Hen. VIII.* If placed in its chronological order, the present volume would follow the 4th and 5th year books. It supplies exactly the chasm between those volumes and the 6th of the same series.

BENLOE AND DALLISON. C. P.

1 HEN. VII.—22 ELIZ. (1486—1580.)

Besides these cases, Benloe contains one or two earlier reports. Dallison's reports are said to have been once blown upon by lord Hobart, who, when they were cited, "demanded by what warrant those reports of Dallison's came in print?"¹ This volume is sometimes cited as new Benloe. This is a mistake. *New Benloe* is a book mentioned further on. Benloe is sometimes written Bendloe, and Dallison with a z—Dallizon.²

ASHE'S TABLES & KEILWAY. K. B., C. P.

12 HEN. VII.—23 HEN. VIII. (1496—1531.)

This volume contains, in addition, some cases *incerti tem-*

¹ Pref. to Croke's reports, 4, a.

² 3 Inst. 109.

poris, and some *temp. Ed. III.* Appended to the volume are some cases by judge Dallison and sergeant Benloe.

MOORE. K. B., C. P., EX. & CH.

3 HEN. VIII.—19 JAC. I. (1512—1621.)

Styled by lord Ellenborough “a very accurate reporter.”¹

DYER. K. B., C. P., EX. & CH.

4 HEN. VIII.—24 ELIZ. (1513—1582.)

According to lord Coke,² never intended by Dyer in this form to have been made public. Sir Edward styles them, however, “a fruitful collection;” and they have been always regarded as among the best of the old reports. Dyer was published originally in French; but in 1794 Mr. Vaillant gave to the profession a new and much improved edition in English. This edition contains several cases not found in the old folio, and now printed from Dyer’s MSS. The notes in the margin of this edition, it is said by Buller,³ were written by lord chief justice Treby; and according to sir Francis, are of “good authority.” To the same effect speaks chief justice Gibbs,⁴ who refers to these notes, as “always to be regarded with deference, coming from an authority so considerable.” Dyer’s MS. reports are often quoted by lord Coke; but it would seem that he referred to some MSS. not yet published; since some of the cases cited by him, (as in 3d Inst. 126, 127; 4 id. 61) do not appear to be in the printed Dyers.

BROOKE’S NEW CASES.

6 HEN. VIII.—6 MARY (1515—1558.)

Cases in the time of Henry VIII., Edward VI., and Mary. This volume is often cited as Bellewe’s cases *temp. Hen. VIII. &c.*; though more commonly under the title placed at

¹ 2 Smith 126; cited in the Am. Jur. vol. viii. p. 269.

² Pref. to 10th Rep.

³ 2 D. & E. 84.

⁴ 4 Dow 202.

the head of the paragraph. The author, I believe, was Bel-
lewe; but the cases are selected out of Brooke.

MARCH'S NEW CASES.

This volume would appear to be a mere translation of the
former, but is arranged differently, being in chronological
order.

NEW BENLOE. K. B., C. P., EX.

22 HEN. VIII.—4 CAR. I. (1531—1628.)

Principally cases in the reign of Hen. VIII., Edw. VI.,
Phil. and Mary, and Elizabeth; with a few select cases in the
subsequent two reigns. There is a vacancy in the impres-
sions of New Benloe, from p. 44 to p. 88, both inclusive; and
the four pages preceding 44 are wrong numbered.

ANDERSON. C. P.

25 HEN. VIII.—2 JAC. I. (1534—1604.)

This book is referred to in one case with great respect, by
sir Edward Sugden, who cites Anderson's report of Chud-
leigh's case, as "indisputably" better than lord Coke's.¹

The copy of Anderson, in the library of the Law Associa-
tion of Philadelphia, belonged to Mr. Pigot, author of the well
known treatise on fines and recoveries, and appears to con-
tain his MS. annotations.

LEONARD. K. B., C. P., EX.

31 HEN. VIII.—13 JAC. I. (1540—1615.)

"Leonard's reports," says sir Edward Sugden,² "were
always in high estimation;" and this opinion is confirmed,
(if Sugden need confirmation from any one,) by lord Notting-
ham, who says, in speaking of the volume, that it is one of
the best books which have lately come out.³ The majority
of cases in Leonard are in later reigns than Henry VIII.

¹ Treat. on Powers, 6th ed. 22.

² Treat. on Powers, p. 16.

³ Duke of Norfolk's case, S. C. C. 31.

PLOWDEN. K. B., C. P., EX.

4 ED. VI.—22 ELIZ. (1550—1580.)

In point of accuracy, Plowden's reports (or commentaries, as he styles them,) rank among the best reports of any age. Indeed, Plowden seems to have understood a reporter's duty; for he tells his readers, that before the case came to be argued, he had copies made of the record, and took pains to study the points of law arising thereupon; so that if he had been "put to it, he was ready to have argued when the first man began." He attended the arguments with the utmost assiduity; and after he had drawn out his reports, submitted them in many instances to the judges or sergeants who had argued the case. He gives the pleadings at length, and also the judgment of the court. His labours have not been without their recompense; for his reports, according to lord Coke, are, "**AS THEY WELL DESERVE TO BE**, with all the professors of the law, of high account."¹ The best edition of Plowden is probably the last, in 2 vols. 8vo.

OWEN. K. B., C. P.

4 MARY.—13 JAC. I. (1556—1615.)

Only a few of these cases are in the reign of James. The greater portion belong to that of Elizabeth. There is a chasm in the paging of Owen, from 76 to 81. Notwithstanding which the work is perfect.

NOY. K. B., C. P.

1 ELIZ.—25 CAR. I. (1559—1649.)

Noy's reports, in MS. probably, are frequently referred to by lord Hale, in his notes to the 1st Inst.; but *this* volume is called by Mr. Hargrave "a loose collection of notes," which he thinks Noy could not have intended for the public eye:² and sir Francis Buller³ says, that Noy has been always considered "as a bad authority." In fact, there is strong ground

¹ Pref. to 10th Reports.² 1st Inst. 54, (a) note.³ 3 D. & E. 424.

to suppose that the book is an imposture, or at best but an imperfect abridgment of Noy's note-book by one of his students. Thus, when a case from the volume was cited in 1 *Ventris* 81, Twisden (called by lord Kenyon¹ "a very able lawyer,") said that he "wholly rejected that authority; for that it was but an abridgment of cases by sergeant Size, who, when he was a student, borrowed Noy's reports, and abridged them for his own use." To the same effect is 2 *Keble* 652; and see Johnson's (N. Y.) Reports, p. 72, where chancellor Kent speaks of a case in Noy as solitary, anomalous, and which cannot be law.

BROWNLOW & GOLDSBOROUGH. C. P.

11 ELIZ.—1 CAR. I. (1569—1625.)

Of the merits of these reports in general, I do not remember any expression of opinion; but in referring to the case of *Coventry v. Windall*,² in the report of which certain expressions are attributed to lord Hobart, which Hobart himself (who likewise reports the case,) does not record as having been said, Tilghman c. j., remarks: "The probability is, that in Brownlow's report of the case, these expressions of Hobart are inaccurately stated."³ The chief justice cites this case as being reported in Brownlow. It is in Brownlow and Goldsborough. Brownlow's reports make a second part to Brownlow and Goldsborough.

REPORTS. K. B., C. P., EX. & CH.

14 ELIZ.—14 JAC. I. (1579—1616.)

The 12th part of Coke's reports, being a posthumous publication, and not having been prepared by the author for the press, has generally been regarded (with the exception of a few cases,) as "of small authority."⁴ Sir Edward Sugden cautions us also in regard to all the reports, lest "our just

¹ 3 D. & E. 17.

² Brownl. & Gold. 67.

³ 6 Sarg. & R. 537.

⁴ 4 B. & Ald. 614; 10 B. & Cress. 275.

admiration of sir Edward Coke's profound legal learning carry us too far." "His system of turning every judgment into a string of general propositions or resolutions, has certainly," says Sugden, "a very imposing appearance; but it is a system, of all others, the least calculated to transmit a faithful report;" and he suggests, "that the bias of a man's own sentiments may involuntarily lead him to pervert the opinions of others in order to support his own." He informs us, likewise, that lord Anderson is said to have stated, in his *private* reports, that Coke had "greatly abused him and others of the judges, in reporting such judgments and resolutions in Shelley's and Chudleigh's case as they never delivered."¹ This infidelity of the great lord has been noted by other judges, and with some asperity by his contemporary, lord Hobart;² and many of the cases are regarded rather as what the law might, could, would, should, or ought to have been decided to be, than as showing the decisions that were actually given.

Notwithstanding all this, however, and much more, Coke's reports are likely to remain pretty much where their author left them two centuries ago. They will still continue to be **THE REPORTS**; and no higher eulogy need they ever receive than that which they drew forth from Coke's great enemy and rival, lord Bacon: "Of this I say no more, but that to give every man his due, had it not been for sir Edward Coke's reports, (which, though they may have errors, and some peremptory and extra-judicial resolutions more than are warranted, yet they contain infinite good decisions and rulings over of cases,) the law, by this time, had been almost like a ship without ballast; for that the cases of modern experience are fled from those that are adjudged and ruled in former time."³

GODBOLT. ALL THE COURTS OF RECORD.

17 ELIZ.—14 CAR. I. (1575—1638.)

See *post*, "Goldsborough."

¹ Treat. on Pow. pp. 23 and 24, 6th ed.

² Hob. 300.

³ Bacon, vol. ii. 230, Phil. ed. 1841.

SAVILLE. C. P., EX.

22 ELIZ.—36 ELIZ. (1580—1594.)

CROKE. K. B., C. P.

24 ELIZ.—17 CAR. I. (1582—1641.)

"A work of credit and celebrity among the old reporters," and which has "sustained its character in every succeeding age."¹ This opinion of chancellor Kent is undoubtedly correct; yet "Croke's law reports" are spoken of in 1 Washington 83, as a book in which may be found "precedents for almost any opinion;" and Keeling j., is reported by *Keble* to have said, that it had been better if Croke's reports had never been printed. One of the old editions, having its date thus, MDCL., is said to be very incorrect; and it is possible that Keeling (if indeed he did say what *Keble* reports,) had that edition before him; while in the other case, the judge may have spoken somewhat at his ease. Undoubtedly, if reference was made to the reports of sir *George* Croke, as now known, the censures were not well considered. *Keilway's* reports, having been published by sir *John* Croke, and being sometimes cited as *Croke's* reports, (*Clarke*,) it is possible that confusion may have arisen in that way; and that sir *George* Croke has not had less cause than lord *Byron* to say, (when some poetry, not his wicked lordship's, was published with his name,) that he desired to be made *responsible for nobody's stupidity but his own*.

Croke remained on the bench until he was above eighty years old; and then, in answer to his petition that by reason of his dullness of hearing and other infirmities, he might be allowed to "retire himself, and expect God's good pleasure," Charles I. granted him, in consideration of his long and faithful services, a writ of ease, dispensing with his services and further attendance at court, but yet continuing him in the office of judge, with its customary emoluments. It is interest-

¹ 1 Kent's Com. 485.² Vol. ii. p. 316.

ing here, while we admit, as we truly must, Charles' deficiency in those qualities which fit men to rule in troublous times, to note how many evidences attest his possession, not less of the sensibilities of a man of genius, than of a *heart* which had, indeed, been "nursed to more than kingly thought." Shakspeare, it is well known, was Charles' favourite author; and in the king's response to the petition of his faithful servant, who can doubt that the portrait of Wolsey's fate, had left its language and its better lesson deep impressed upon the royal martyr's mind. "We shall never expect," says Charles, "much less require or exact from our loving subjects, performances beyond what their health and years shall enable them; so we shall not dismiss them without an approbation of their service, when we shall find that they shall have deserved it, *much less expose them in their old age to neglect.*"¹

¹ Badly, we fear, would the humanity of kingly rule, the justice of Laud's and Strafford's day, sometimes compare with those of free and happier lands! The late constitution of Pennsylvania, it is well known, secured to all judicial officers appointed under it, a tenure *during good behaviour*; and under this fundamental guaranty of public faith, many men, resigning the sure rewards of professional fame, had fashioned themselves, by years of toil, to the discharge of judicial function: and were now unfitted to resume the long abandoned habit of an early life. Commissioned "during good behaviour," it was impossible, by any process known to constitutions, that these persons should be deprived of office, while yet unreprieved of fault. But fraud and malignity are ingenious in resource. *Conventions* may disregard what *constitutions* have made sacred. As though constitutions of government were not designed to protect men against tyranny in every form. As though it were matter of import under what *names* you injured men, or as if any power on earth could render politically right, acts which, in their own essence, must be wrong. But a convention was "the provided machinery of peaceful revolution;" and by this sophistic juggle, at once perfidious, cruel, and absurd, did the Pennsylvania convention of 1837 deprive of their offices the whole judiciary of an extensive state. The oratory which the printed *debates* record, was worthy of the occasion: "But injustice," exclaims one of the speakers, "will be done to judges, by turning them out of office, we are told. He may be a poor man, and may have a family dependant upon his salary; but is this a reason why he should hold an office against the consent of the people, which was established by themselves for themselves? The office is

In the quaint language of his biographer, the venerable judge, having got his dismissal, made a "holy retreat" to his house in Oxfordshire, where he remained, surrounded by affectionate children, "till a *certiorari* came from the great judge of heaven and earth, to remove him from a human bench of law to a heavenly throne of glory."

The best edition of these reports is the 4th, by Leach. The paging in Croke is repeated in *Eliz.*, from 457 to 473, and in *James*, from 617 to 620.

GOLDSBOROUGH. ALL THE COURTS OF WESTMINSTER.

28 ELIZ.—44 ELIZ. (1586—1602.)

"Godbolt, Goldsborough, and March; mean reporters; but not to be rejected."¹

theirs, not his." Just as though that were not a man's property, which the state had not only invited but encouraged him to accept. As if those just emoluments of office were not property, when, for the payment of them, the faith of the commonwealth was pledged by its constitution;² and when, on the guaranteed certainty of payment, a whole description of men had formed their habits of life, and perhaps led many persons to dependance upon them. As if, too, the proper feelings of men, their well earned reputation, their rank in their own and in public regard, were not their property; as truly property as those grosser possessions which, to use Mr. Burke's language, one may measure with a two-foot rule, or count upon his ten fingers. "Our charities and our poor houses," continues this decent orator of the convention, "ARE ALL OPEN TO JUDICIAL MENDICANTS, as well as others." (*Debates in the Pennsylvania Convention of 1837*, vol. iv. p. 339.) If such language be not indeed the gibberish of a fierce malignity, then did the Burke we have already quoted say well, that he had "seen in the rank of statesmen, persons with the conceptions and characters of pedlars."

¹ North's Study of the Law, cited in Greenleaf's Overruled Cases 153.

² "The judges of the supreme court and of the several courts of common pleas shall hold their offices during good behaviour." The judges of the supreme court and the presidents of the several courts of common pleas, shall, "at stated times, receive for their services an adequate compensation to be fixed by law; which shall not be diminished during their continuance in office." (*Constitution of 1790*, art. v. § 3d.)

POPHAM. K. B., C. P., CH.

34 ELIZ.—3 CAR. I. (1592—1637.)

This book contains, moreover, some cases from 15th James I. to 2d Charles I. In 1st *Keble* 676, Hyde, chief justice of the king's bench, in citing a case from Popham, said: "Which I vouch, because I heard it; not for the authority of the book, which is none." To the same effect, as to part of the book, lord Holt, in 1st *lord Raymond* 626. In fact, Popham's reports, properly so called, occupy only the first 123 pages of the volume; and the cases in that part are more respected than those which follow.

YELVERTON. K. B.

45 ELIZ.—11 JAC. I. (1603—1613.)

These reports are of selected cases, and generally cases which sir Henry Yelverton himself argued. The author having been one of the most eminent lawyers of his age, which was truly "the Augustan age of our old common law learning;" and these reports having been prepared for the press, as is supposed, by Yelverton himself, they are of course much esteemed.¹ They were edited in our own country, in 1820, by Mr. Metcalf; and the notes of that gentleman are pronounced by a competent authority to be "valuable and accurate."²

HOBART. K. B., &c.

1 JAC. I.—1 CAR. I. (1603—1625.)

But containing, in addition, some cases *temp.* Eliz. These reports were published originally by a careless editor, but were subsequently revised and corrected by lord Nottingham. They are said however by chancellor Kent, yet to be defective in method and precision; but they are admitted to be a standard work of their day. The book is regarded as one of authority by chief justice Tilghman;³ while lord Kenyon, who

¹ 7 Johns. 164.² 1 Kent's Com. 485.³ 6 S. & R. 527.

was indeed so thoroughly acquainted with the English books as perfectly to enjoy them, speaks of it as an "excellent volume."¹ The marginal annotations, excepting a few referring to matters since Hobart's death,² are regarded as the production of sir Henry himself,³ and of course, possess authority.

An interesting tribute to lord Hobart, is found in the preface to Jenkins' centuries. "Lord Coke and lord Hobart," says judge Jenkins, "have furnished surprising light to professors of the law. They were two men of great authority and dignity; men who, to the most accurate eloquence, joined a superlative knowledge of the laws; being also judges of consummate integrity." He prophesies that the monuments of the great abilities and diligence of this "noble pair," whom for many years he had "marked, observed, and revered," will remain as long as the "splendour, majesty, and name of the kingdom of England shall endure."

An edition of Hobart, by Mr. John M. Williams, one of the justices of the court of common pleas of Massachusetts, was printed in this country in 1829, and is enriched with valuable notes. I cannot but think, however, that the perfection of the volume, is impaired by the omission of some cases deemed by the learned editor, useless in this country. The cases omitted are not numerous, nor of general interest, it is true; but it is impossible for any editor to say what cases his readers, in their various exigencies, will not have occasion to consult. The learned editor believes "that every case is retained which would be useful to the American lawyer;" while it happens that the only case in Hobart⁴ to which I have had occasion to refer, is entirely omitted. There is too, something in the mere idea of a mutilated volume, that impairs the satisfaction with which even other men than Mr. Frognall Dibdin would

¹ 6 D. & E. 441.

² Lord. Raym. 1161.

³ 1 Ves. 305.

⁴ *Slade v. Drake*, p. 295, containing a censure of lord Coke, and quoted *ante*, p. 284.

possess it; and the remark of la baronne de Stülzel, is in some sort applicable to a perfect possession of any sort, as to the possession of perfect knowledge: "*savoir parfaitement* (we quote from memory,) *ce que l'on sait, donne un repos à l'esprit semblable à celui de la conscience.*" Still, however, the edition is a truly valuable one, and much better than any other. Its excellence in other respects, renders more striking the defect just mentioned, a defect which might have been so easily avoided.¹

CASES OF PRACTICE. K. B.

1 JAC. L.—15 GEO. III. (1693—1775.)

DAVIS. K. B. & EX. OF IRELAND.

2 JAC. L.—10 JAC. I. (1604—1612.)

Sir John Davis, who was attorney-general of Ireland, states in his preface, that the cases reported in this volume, were selected "principally for the use and benefit of our practisers

¹ It is an interesting fact, that American lawyers should have given to England the latest and best editions of two of her early reporters. The symptom is a hopeful one for our national Themis. It is a good sign when an age republishes other works besides its own; "just (says the *British Critic*,) as it is a good sign when a man can enter in other persons' thoughts, feelings, and views, and is not always bent upon putting forth and developing his own." (Vol. xxxi. p. 169.) Much of modern repugnance to reading the old reporters arises, no doubt, from the huge volumes in which they are incarcerated, from the hirsute aspect of a Gothic letter, and the other incommunities of an exploded mechanism. If these venerable authors were dressed more *à la mode*, and made to look like ourselves, we should feel less awe in taking them by the hand, and in asking their advice. Indeed, if there were more persons to perform the labours so acceptably discharged by the editors of Yelverton and Hobart, it is not easy to believe that the profession would groan, as it does, under the intolerable burden with which, by modern reporters, we are wearied and grieved. We should not be made to read, in hundreds of new volumes, the re-decisions of questions perfectly settled by the generations before us. By communing more closely with these spirits of the great departed, we should form more modest appreciation of our own times; and, in the conviction that the intelligence and labours of the dead are as sterling as those of the living, should find restraint to that *disregard of authority* which, in some of our states, has become the bane of their jurisprudence.

here in Ireland:" and when they were cited in *Evan v. Ascough*,¹ one of the judges (Jones,) remarked: "*Davies reports ne sont canonical;*" and another, (Doderidge): "*fuerent faits pour le meridian de Ireland seulement.*" However, they appear to contain very good law, and where applicable, I presume may be quoted; since lord Kenyon,² relied a good deal on Davis, and spoke of it as a well known fact, that though the cases were decided in Ireland, the volume was cited as "authority in England." No man of modern times (Mr. Hargrave possibly excepted,) was better able to speak on such a subject, than lord Kenyon. Indeed a very competent judge, and one no way partial to his lordship, has admitted, "that he possessed more juridical knowledge than any other intermediate successor of the learned Hale."³ The opinion of lord Kenyon, will no doubt prevail in this day; for since the union, certainly, no reports are more authoritative both in England and here, than the Irish. Those of the Irish chancery have long been regarded as unsurpassed: while the common law reports are rapidly rising to the same point of estimation.⁴

LANE. EX.

3 JAC. I.—10 JAC. I. (1605—1612.)

LEY. K. B, C. P., EX. & COURT OF WARDS.

6 JAC. I.—5 CAR. I. (1608—1629.)

These reports, though published under the name of sir

¹ Latch 238; S. C. Palmer, 462. ² 4 D. & E. 194. ³ Pref. to East P. C. p. 9.

⁴ An American lawyer will be gratified to know, that while the decisions of the Irish courts are so frequently cited in this country, the jurisprudence of the United States is not wholly unknown at the bar of Dublin. In an interesting letter lately received from one of the intelligent joint-reporters of the Irish Q. B., Mr. Jebb, he remarks, after speaking of the present state of the international copyright law: "But in the mean time I may observe, that there is already among us here a considerable acquaintance with the works of legal writers in America, and that, whenever applicable, none are cited in our courts with greater effect."

James Ley, are regarded as supposititious; a fact much to be regretted, since in connexion with the name of *Ley*, every reader will recall Milton's sonnet, and

——— "that good earl, once president
Of England's council and her treasury,
Who lived in both, unstained with gold or fee,
And left them both, more in himself content,
Till sad, the breaking of that parliament
Broke him, as that dishonest victory,
At Cheronea, fatal to liberty,
Killed with report that old man eloquent."¹

CALTHROP. K. B.

7 JAC. I.—16 JAC. I. (1609—1618.)

Principally touching the customs of London, but said by sir J. Burrow² to be "prettily reported, and worth reading."

BULSTRODE. K. B.

7 JAC. I.—15 CAR. I. (1609—1639.)

In 2d Bulstrode, (edition of 1658,) there is a chasm in the paging from 99 to 109; and in an edition of 1688, from 104 to 114; notwithstanding which the book is perfect.

HUTTON. C. P.

10 JAC. I.—15 CAR. I. (1612—1639.)

BRIDGMAN, SIR JOHN. C. P.

11. JAC. I.—19 JAC. I. (1613—1621.)

"They are not often referred to, nor do we understand that they are highly esteemed."³

¹ The singular learning and abilities of sir James Ley, having raised him through all the great posts of the law, he was created earl of Marlborough, lord high treasurer, and lord president of the council to king James I. He died at an advanced age: and Milton attributes his death to the breaking of the parliament. And it is true, that the parliament was dissolved the 10th of March, 1628-9, and that he died on the 14th of the same month. (*Note to Milton's sonnet.*)

² P. 249. vol. 2d. ³ Bridgman's Leg. Bib. 34, cited in Am. Jur. vol. 12, p. 18.

ROLLE. K. B.

12 JAC. I.—1 CAR. I. (1614—1625.)

According to sir Matthew Hale, these reports are “of sergeant Rolle’s own taking, and very good.” Rolle was chief justice of England during the protectorate; and sir Matthew, in the preface to Rolle’s abridgment, pays the highest tribute to his learning and ability. His works however, were not published until after the restoration, when of course his Cromwellian dignity was not recognised.

PALMER. K. B., C. P.

17 JAC. I.—5 CAR. I. (1619—1633.)

Palmer was attorney-general under Charles II.; and his work, according to chancellor Kent, is of respectable authority.¹

JONES, SIR WM. K. B., C. P.

18 JAC. I.—17 CAR. I. (1620—1641.)

This volume is cited sometimes as *first* Jones, sometimes as W. Jones, to distinguish it from *second* or T. Jones. Clarke records that in Easter term, 3 W. & M., it was declared by the whole court, that this book was “very judiciously written.” And it is said² that when a case in Jones was questioned as anonymous, Lawrence j. said, *that Jones was not a reporter to mistake the law of the case, though he might not have heard the name.* The book must be esteemed authoritative, if for no other reason than for this, that it appears, from a MS. still preserved in the Hargrave collection, that Mr. Hargrave himself translated it into English, (from the French, in which it was originally printed,) and contemplated a publication of the volume.

WINCH. C. P.

19 JAC. I.—1 CAR. I. (1621—1625.)

Principally touching declarations. The cases in this vol-

¹ 1 Com. 486.² Am. Jur. vol. 12, p. 29.

ume, according to lord Kenyon,¹ "are, *in general*, well reported." It is said, however, in the preface to Benloe and Dallison's Reports, that this volume is improperly attributed to Winch; and a fact is stated by those gentlemen which, if true, certainly affords a presumption that they are right: they say that Winch died several years before the cases were decided!

The curious and indefatigable Mr. Umfreville, who, in his peculiar department, was scarcely less remarkable than Champollion in *his*, has confirmed this assertion; and pronounces, with great confidence, that though published as judge Winch's, these reports are, in fact, Mr. Allestree's.

LATCH. K. B.

1 CAR. I.—4 CAR. I. (1625—1628.)

In the preface to Palmer's reports, it is more than intimated that Latch stole 120 of these reports from Palmer's note-book, which Palmer had unsuspectingly lent him. It is said in that preface, that the cases are reported "corruptly enough." The volume, it is certain, is not regarded as of much value; and is ranked by Mr. Bannister as among the "least accurate" of the reporters.²

LITTLETON. C. P., EX.

2 CAR. I.—8 CAR. I. (1626—1632.)

It is said in the preface to this volume, that care had been taken to leave out all cases reported in contemporary reporters; notwithstanding which, a portion of these cases are found in exactly the same form in Hetley's reports.

HETLEY. C. P.

3 CAR. I.—8 CAR. I. (1627—1632.)

It is a well known historical fact, that in the reign of James

¹ 6 D. & E. 441.

² Pref. to sir O. Bridgman's judgments, p. ix.

I., lord Bacon procured the revival of the ancient office of reporter, which had been dropped by Henry VIII. The title page of Hetley informs us that the author was appointed "by the king and judges for one of the reporters of the law;" and this would appear to be the only evidence of the station's having been occupied. If however we are to judge by this volume, the advantages which were anticipated from the revival of the office seem to have failed: for whether Hetley (or, as has been sometimes thought, lord keeper Littleton) was the author of these reports, they are said by Mr. Douglas to be "far from bearing any marks of peculiar skill, information, or authenticity."¹

CLAYTON. ASSIZES.

7 CAR. I.—3 CAR. II. (1631—1651.)

MARCH. K. B., C. P.

15 CAR. I.—19 CAR. I. (1639—1643.)

According to 10th Mod. 138, March is styled by c. j. Parker, "a very indifferent reporter." *Sed quære de hoc.*

STYLES. U. B.

21 CAR. I.—8 CAR. II. (1645—1656.)

These reports are principally valuable as being the only records of the decisions of Rolle and sir John Glynn—the very able chief justices during the protectorate.

It is recorded of the fanatics of the republic, that in reciting the Lord's prayer, they would never say, "thy *kingdom* come," but always, "thy *commonwealth* come."² From a similar spirit probably, though with better sense, the K. B. was styled during the time of Rolle's and Alleyn's reports, the upper or public bench.

¹ Pref. to Doug. Rep. p. vii.² Hume, vol. viii. p. 151, n.

ALEYN. U. B.

22 CAR. I.—1 CAR. II. (1646—1649.)

In *Dare v. Chase*,¹ this book was cited; and Dolbein, justice, took occasion to say of it, that “the publisher had much wronged the author; for that he (Dolbein) had the original manuscript, and had compared them, and found it to be mistaken in several cases, even as to the very resolutions of the court.”

HARDRES. EX.

6 CAR. II.—31 CAR. II. (1654—1689.)

There is a chasm in the paging of Hardres, from p. 232 to 301.²

¹ 2 Show. 164.

² The reader has doubtless noted the fact, that chasms and mispasing frequently occur in works printed about this time; as, for example, in Hardres, Pollerfen, Croke, Bendloe, Owen, Bulstrode, and probably in other reporters; notwithstanding which, that the volumes are regarded as perfect. The cause of this circumstance, I have not seen explained. Undoubtedly the press was in a very corrupt state about the middle of the 17th century, and, in fact, until its freedom was established, a few years after the revolution. Sir Thomas Browne speaks of his having “lived to behold the highest perversion of that excellent invention,” and that the most solemn writings were “depravedly, anticipatively, counterfitly imprinted.”—(*Pref. to the Relig. Medici.*) We find the same subject, and the “rumage of dead men’s libraries,” the theme of complaint in many other works published about Browne’s time. Indeed, in no other than a very corrupt state of the press, could such a fact exist in regard to the writings of an eminent person, as Mr. Haime records of the *Lex Basilike*, that “the proofs brought to evince that this work is or is not the king’s, are so convincing, that if any impartial reader peruse any one side apart, he will think it impossible that arguments could be produced sufficient to counterbalance so strong an evidence.”—(*Hist.*, vol. viii. p. 153.)

It is likely that the works in which these imperfections occur, were clandestinely printed by the Curls of the day; and that to insure dispatch, the copy was distributed among different offices: but happening to prove *fetter* or more *lean* (as printers say), than had been calculated upon, the MS., when put into metal, over-ran or fell short of the paging which had been made.

SIDERFIN. K. B., C. P., EX.

9 GAR. IL.—23 CAR. IL (1657—1670.)

Being cited, Dolbin, justice, said: It is a book "fit to be burned; being taken by him when a student, and unworthily done by them that printed it."¹ Opinions to the same flattering effect are found in 2 *Ventris* 243, and in *Comberback* 377. In the last cited place, the following dialogue is reported:

HOLT C. J. "It was resolved in the case of Butler and Hodges, in this court, that no damages should be intended to be given for that which is void."

CARTHEU. "I can gather no such matter from that case as 'tis in Sid. 319."

HOLT. "Ay: many good cases are spoiled in Siderfin; neither reported with that truth nor with that spirit which the case required. The case of Opy and Thomassius is much abused; scarce intelligible there."

THE RESTORATION.

BRIDGMAN, SIR ORLANDO. C. P.

12 CAR. IL.—19 CAR. IL (1660—1667.)

The observant reader may have noted in sir Matthew Hale's Pleas of the Crown, p. 303, a citation *ex libro Bridgman*; and again, on p. 121, a reference to a MS. of "my lord keeper Bridgman," from which sir Matthew has transcribed a long report. Lord Holt, likewise,² speaks of the case "of *Murrell* and *Osborn*, a report of which I have under my lord c. j. Bridgman's own hand, in a MS. I have of his:" and it would appear from other historical references, that sir Orlando left a large collection of MSS. behind him.

As is known, sir Orlando was among the most eminent

¹ 1 Show. 252.² Pigot on Recoveries 197.

lawyers of the period about the restoration; and according to Lord Holt,¹ "a very studious gentleman," who "had an account brought to him of all that passed in the courts." And as the law in Bridgman's time, was in what may be called a transition state, a state of passage from the old to the modern system, and as the decisions of that epoch happen to be handed down to us by Latch, Carter, Keble, Siderfin, and other inaccurate reporters, it is much to be regretted that all the MSS. of the chief justice cannot be recovered. The present volume, it will be seen, embraces a term of but seven years. It is printed from the MSS. of Mr. Hargrave, and first appeared in 1823. No other recommendation will be needed of the volume, than to know that that gentleman thought that the cases had been prepared for publication by Bridgman himself, and contemplated publishing the volume. Mr. Fonblanque² speaks of Bridgman's reports, of which Mr. Hargrave had lent him the MSS., as far exceeding Carter's in copiousness, depth, and correctness.

Few judicial characters have received more homage from contemporaries, than sir Orlando Bridgman. Lord Clarendon styles him "very eminent in the knowledge of the law." Lord Nottingham thought that he should not be mentioned but "with reverence and with veneration for his learning and integrity;" and one of his reporters, pays to him this highest compliment which a member of the profession could receive: "he always argued like a lawyer and a gentleman."³

RAYMOND, SIR T. K. B., C. P., EX.

12 CAR. II.—36 CAR. II. (1660—1684.)

Extending however, with an interruption, as far back as 1653.

LEVINZ. K. B., C. P.

12 CAR. II.—9 WM. III. (1660—1697.)

Lord Hardwicke is some where reported to have said, that

¹ Pigot 197. ² Treat. on Equity, vol. 2, p. 172, *note*. ³ Pref. to Carter's Reports.

though Levinz was a good lawyer, he was sometimes "a very careless reporter;" but the book, notwithstanding this censure, is frequently cited, and in chancellor Kent's notice of judicial reports,¹ is spoken of as "of authority." See also, 5 Burrow 2731, and 3 D. & E. 17, where both lord Mansfield and lord Kenyon speak of Levinz as a better reporter than Keble; which indeed is not to say a great deal. It appears, by a record of Mr. Hargrave, that among his collection is a MS. contemporaneous with Levinz, and much more copious. Should Levinz ever be re-edited, no doubt he will be presented in a much improved form.

KEBLE. K. B.

13 CAR. II.—31 CAR. II. (1661—1679.)

Keble, like Siderfin, has had the happiness to unite all opinions. Willes c. j., some where speaks of him as "a reporter who seldom enlightens any thing." Mr. justice Park burned his copy, thinking it not worth while to lumber his library with trash. Lord Mansfield² called him "a bad reporter;" and the baron of Gredington, who it is known rarely affirmed his great predecessor's judgments, dissented not in this.³

However, though so bad a reporter, Keble is styled by Burnet j.,⁴ "a tolerable historian of the law;" and by lord Hardwicke, "though very far from being accurate," "a pretty good register."⁵

KELYNG, SIR JOHN. K. B. (PLAC. COR.)

14 CAR. II.—22 CAR. II. (1662—1669.)

It is said by sir Michael Foster⁶ that these reports were published by lord Holt. The volume is sometimes cited as *first* Kelyng, and must not be confounded with Kelyng's

¹ 1 Com. 486. ² 1 Doug. 305. ³ 3 D & E. 17; Ridgeway's cases 100, *note*.

⁴ 2 Wilson 330. ⁵ Ridgeway's Cases 100. ⁶ Crown Law, p. 204.

chancery cases, &c., as this last book is sometimes quoted, *second Kelyng*.

CARTER. C. P.

16 CAR. II.—23 CAR. II. (1644—1673.)

With some cases in the time of c. j. Vaughan. This is but an inaccurate volume. In *Burgess v. Wheate*,¹ lord Mansfield relied on a report of Carter's,² of what c. j. Bridgman had said: but by reference, since, to Bridgman's own MSS., there appears to be nothing said by the c. j. of the sort attributed to him by Carter.³

VAUGHAN. C. P.

17 CAR. II.—26 CAR. II. (1645—1674.)

Like most of the reports about this epoch, Vaughan's come to us *d'outre-tombe*. They are of very unequal merit; some, which are supposed to have been written out by himself, "giving a true picture of his mind," and being highly interesting: others being quite inaccurate. During the rebellion, Vaughan sided, as the law may be supposed to have taught him, with his king: and holding it to be unlawful to recognise judicial authority not derived from "a lawful prince," retired entirely from practice. His honesty was better rewarded at the restoration than honesty generally was by Charles the Second; Vaughan having been made chief justice of the common pleas. A severe censure of Vaughan's manner of reporting is found in 2d Vesey 281; but should not be taken as applicable to all his cases.

SAUNDERS. K. B.

18 CAR. II.—25 CAR. II. (1666—1673.)

"The most valuable and accurate reports of their age: and this is the character which has been repeatedly given of them in modern times."⁴ To the same effect speaks 3 Bur.

¹ 1 W. Black. 166; S. C. Eden, 220.

² 2d Fomblanque's Eq. 170, n.

³ Geary v. Beareroff 67.

⁴ 1 Kent 485.

1730. "That excellent book!"¹ And chief justice Willes, having quoted Saunders, thought it unnecessary to "mention any other authority after him."² But the work has been brought into special prominence by the notes of sergeant Williams, which do, indeed, more than place the annotator on a level with the author. Tindal c. j., some where speaks of them as being "now esteemed a text-book of our law." "A sounder lawyer or more accurate special pleader," says baron Vaughan, in speaking of Williams, "has rarely done honour to his profession:"³ and even the pauciloquently praising lord Eldon, went so far as to cite Mr. Williams' notes in the house of peers, and to add: "Though one who had held no judicial situation, could not regularly be mentioned as an authority, yet he might say, that to any one in a judicial situation, it would be sufficiently flattering to have it said of him, that he was as good a common lawyer as Mr. sergeant Williams; FOR NO MAN EVER LIVED TO WHOM THE CHARACTER OF A GREAT COMMON LAWYER MORE PROPERLY APPLIED."⁴

Notwithstanding these re-iterated eulogies, the reader who often consults these notes, will probably think with chancellor Kent, that with all the praise justly due to the edition, it is liable to the objection of making one of the old reporters, the vehicle of voluminous dissertation; and that it had been better if sergeant Williams had given his labours to the profession in a separate and more systematized form.⁵ In regard to the cases of the original reporter, it may be observed, that they too are rendered less interesting by so numerous diversions, that the mind becomes "refrigerated" by these 'frequent interruptions, and the thoughts injuriously withdrawn from the principal subject before them.

JONES, SIR THOMAS. K. B., C. P.

19 CAR. II.—1 JAC. II. (1667—1685.)

¹ Lord Eldon, 2 B. & P. 23.

² 1 Comp. & Jerv. 9.

³ 3 Dow 15.

⁴ Willes 479.

⁵ 1 Com. 486.

VENTRIS, PART I. K. B.**20 CAR. II.—36 CAR. II. (1668—1684.)****VENTRIS, PART II. C. P., CH.****21 CAR. II.—3 WM. III. (1669—1691.)****POLLEXFEN. K. B., C. P., EX. & CH.****21 CAR. II.—1 JAC. II. (1669—1685.) WITH SOME CASES ANTERIOR TO 21 CAR. II.**

The impressions of Pollexfen are very incorrect; and chasms are found in the pages, viz. 173 to 176; 181 to 184; 649 and 652 mis-paged, and 189 repeated. The circumstance is less important than it would be, did Pollexfen always record the judgments of the court, as well as his own arguments. The learned author whom we so often quote, calls Pollexfen's reports, "a respectable authority;" though he remarks, that "a considerable part of the discussions and decisions which they record, ceases to excite much attention, or to be very applicable to the new and varied course of human affairs."¹

MODERN. K. B., C. P., EX. & CH.**21 CAR. II.—4 GEO. II. (1669—1732.)****(1) VOL. I. K. B., C. P. 21 CAR. II.—30 CAR. II. (1669—1678.)**

Containing also the case of *Fry v. Porter*, in chancery. This volume is sometimes called Colquit's reports; having been prepared by Anthony Colquit Esq.

(2) VOL. II. C. P. (PRINCIPALLY.) 26 CAR. II.—35 CAR. II. (1674—1683.)

In lord Raymond's reports, 537, we find the following paragraph: "Mr. Carthew cited a case in 2d Mod. 97, to the contrary, to which Holt, c. j., *in id.*, said, that no books

¹ 1 Kent's Com. 487.

ought to be cited at the bar, but those which were licensed by the judges."

(3) VOL. III. K. B., C. P., EX. & CH. 34 CAR. II.—3 WM. & M.
(1682—1691.)

(5) VOL. IV. K. B., C. P., EX. & CH. 3 WM. & M.—8 WM. & M.
(1691—1696.)

In *Slater v. May*,¹ a report was cited from 4th Mod.; but upon search of the roll, it was discovered that the statement of the case omitted a material circumstance. Whereupon the chief justice Holt is reported to have said: "See the inconveniencies of these scrambling reports! They will make us appear to posterity for a parcel of blockheads," p. 1072.

(6) VOL. V. K. B., C. P., EX. & CH. 5 WM. & M.—12 WM. & M.
(1693—1700.)

(9) VOL. VI. Q. B., C. P., EX. & CH. 2 ANNE.—4 ANNE. (1703—1705.)

Lord Hardwicke styled this "a book of no great repute;" but referring to a case in it, called the case "well reported."² And to the same effect, *Ridgeway* 126.

(7) VOL. VII. Q. B., C. P., EX. & CH. 1 ANNE. (1702 AND 1703.)

This volume is by Thomas Farresly, author of the cases *temp.* Holt. It possesses, I believe, no great authority, although rather more than some other of the volumes of modern.

These seven parts were revised and corrected by Danby Pickering Esq.

(11) VOLS. VIII. & IX. K. B., CH. 8 GEO. I.—13 GEO. I. (1722—1727.)

Sometimes cited as "Modern Cases in Law and Equity."³

¹ 2 Lord Raymond 1071.

² 1 Ves. 11.

The 8th vol. is of cases in the K. B., from the 8th to the 13th Geo. I. (1723-27); the 9th principally of chancery cases during the same term; with a few cases of appeal, and also some chancery cases during lord Hardwicke's time. The *contenu* of the volumes, however, need not be more particularly specified, as Mr. justice Wilmot, according to lord Kenyon,¹ said, that nine cases out of ten in the book are totally mistaken. Mr. justice Bayley² calls it "notoriously inaccurate;" and in fact, the book is generally treated with contempt whenever mentioned. See Burrow's reports, vol. i. 386, in *marg.*, where it is called "a miserably bad book." Also vol. iii. 1326, in *do.*; also of 9 Mod., what is said by sir T. Plumer.³ It is difficult to tell why such volumes should be republished.

(10) VOL. X. K. B., C. P., EX. & CH. 8 ANNE—7 GEO. I. (1709—1721.)

Not of much authority;⁴ but in the great case of *Mostyn v. Fabrigas*,⁵ lord Mansfield cited a case from it.⁶ Formerly called Lucas' reports; also, occasionally, cases *temp.* Mac.⁷

(8) VOL. XI. K. B. 1 ANNE—9 ANNE. (1702—1710.) AND 4 GEO. I.—5 GEO. II. (1718—1732.)

With a few cases in the C. P. The volume is said, *arguendo*,⁸ to be a book of no authority. It is cited in the old books as cases *temp.* Qu. Anne.

(4) VOL. XII. K. B. 2 WM. III.—1 ANNE. (1690—1702.)

Formerly cited as cases *temp.* Wm. III. Called by Buller,⁹ "not a book of any authority." But notwithstanding this censure, chief justice Marshall, in *Bank of the United States v. Deveaux*,¹⁰ felt authorized by a case in 12 Mod., to adjudge a point of some difficulty. But the character of the volume

¹ 7 D. & E. 239.

² 3 M. & R. 405; cited in Greenleaf's O. C. 252.

³ 2 Jac. & W. 171.

⁴ 1 Bur. 153; 1 Doug. 61.

⁵ Cowp. 161.

⁶ P. 178.

⁷ Maclesfield.

⁸ 1 Cowper 16.

⁹ 1 Doug. 83.

¹⁰ 5 Cranch 91.

was not noticed at the bar, nor indeed does the case appear to have been cited.

There are two editions of the modern reports; one in folio, where the whole 12 parts are bound in 9 vols.; and another and much better edition by Leach, 12 vols. 8vo. Lond. 1796. It is probable that the censures made at different times upon the various volumes of modern, are particularly applicable to the old editions.

It will be seen that the volumes, as printed and bound, do not follow one another in chronological order; some of them iterate the same years, and some years are wanting. The Arabic numeral prefixed, indicates the arrangement in order of time.

FREEMAN. K. B., C. P.

22 CAR. II.—2 ANNE. (1670—1704.)

With a few cases of an earlier date. Freeman's note-book having been stolen by a servant, and published without the privity of the author's family, these reports were formerly regarded as without much authority. They were so characterized by sergeant Glynn, *arguendo*;¹ but lord Mansfield said, that "some of the cases in Freeman were very well reported;" and the court of K. B. gave judgment in conformity with the precedent, to which the sergeant objected. Lord Redesdale, while at the bar and solicitor-general, expressed a favourable opinion of them; and lord Loughborough confirmed him, by remarking that they were generally good.² And in *Monk v. Monk*,³ lord Manners, adverting to the reputation of Freeman's notes, decided a point which was before him in conformity with a case there reported. The probability is, that in the circumstances in which the volume first appeared, some of the cases may be incorrectly or crudely presented; but it has been observed, that those cases in Freeman of which there are contemporary reports, mostly coincide with

¹ *Rex v. Gence*, Cowp. 15.

² *Burn v. Burn*, 3 Ves. 580, n.

³ 1 Ball & Beat. 307.

such reports; and this concurrence, according to lord Mansfield,¹ may be taken as demonstration of truth, even if the reporter were "the worst that ever reported."

In addition to the common law cases, Freeman's notes contained a considerable number of chancery and exchequer cases. These were formerly bound up in the same volume with the common law cases; and a portion of the equity cases were placed in the middle of the common law reports! But the two sorts have of late been separated. The common law cases were republished in 1826, with notes and references by Mr. Smirke, and the chancery cases, in 1823, by Hovenden. These editions, it is scarcely necessary to add, are greatly preferable to the old edition in folio, and have quite superseded it.

SHOWER. K. B.

30 CAR. II.—7 WM. III. (1678—1695.)

Leach's edition in 2 vols. 8vo. is much preferred to the old edition in folio: but from a note left by the learned Mr. Umfreville, it would appear as if the genuine reports of sir Bartholomew Shower had never yet been printed. Speaking of a MS. in the Lansdowne collection, Mr. Umfreville says: "This MS. greatly controls the printed Showers; and contains many good cases not printed, and seems to be his regulated collection of cases, prepared, as I conceive, by himself, and methodized from his note-book, with a view to the press. But his papers, after his death, falling into the hands of a bookseller, he, *causa lucri*, at different times printed his general collection, without due consideration had of these selected cases, which were the only cases I conceive sir Bartholomew ever intended for the press."

In order of time, the 2d volume of Shower precedes the 1st.

¹ *Rex v. Gence*, Cowp. 16.

SKINNER. K. B.

33 CAR. II.—10 WM. III. (1681—1698.)

LUTWYCHE. C. P.

34 CAR. II.—3 ANNE. (1682—1704.)

Lutwyche was originally printed in French; but was subsequently translated by Nelson. Of this translation Mr. Viner, after speaking of the various misfortunes which have befallen authors, in having mercenary editors, remarks as follows: "But besides these, there are many other *grievances*; among which may be reckoned such books as Nelson's Lutwyche; a book which deserved public censure, at least, as being a reproach and dishonour to the profession, and rather adapted to Billingsgate than Westminster hall. What notion will any foreigner entertain of our law, to see a volume thereof stuffed with such ungentlemanlike language, and to meet with such ridiculous and scoundrel titles as *law quibbles*, &c.; to see skeleton treatises on some particular head, very imperfectly done, with the help of a number of idle precedents, swelled up into a thick volume."¹ I am not able particularly to explain this somewhat Cervantic indignation of the venerable compiler. Such high ideas of professional *bienstance* must be taken, it is to be feared, as belonging to that age which "is gone."

COMBERBACK. K. B.

1 JAC. II.—11 WM. III. (1685—1699.)

Said by lord Thurlow to be of bad authority;² and in *Cooper v. Chitty*,³ lord Mansfield says: "Comberback, in giving judgment of the court, which is the only sensible part of his whole report, (for it is plain to me that he did not understand the former argument, &c.*)" Buller, too, according to Clarke, said that "if his memory did not greatly fail him," this book, with Noy, had been forbidden to be cited.

¹ Pref. to Abridgment.

VOL. II.

² Clarke.

27

³ 1 Bur. 36.

CARTHEW. K. B.

2 JAC. II.—13 WM. III. (1686—1701.)

Woodeson, in his law lectures, calls Carthew "a reporter of no great merit;"¹ and lord Thurlow is reported to have said that he was bad authority.² But lord Kenyon said (*obiter* and parenthetically) that Carthew, in general, was a good reporter;³ and chief justice Willes, (in an argument, however, where he was *combating* a case from Carthew,) "I own that Carthew is, in general, a very good and very faithful reporter."⁴

REPORTS TEMPORE HOLT. K. B., C. P. & EX. CH.

1 WM. III.—10 ANNE. (1688—1711.)

This book is by the same reporter as 7th Modern (Thomas Farresly), and of about as much, that is to say, of but indifferent authority.⁵

SALKELD. K. B., C. P., CH. & EX.

1 WM. III.—11 ANNE. (1688—1712.)

The third volume of Salkeld, it is supposed, was not designed for publication. It is a posthumous work, consisting principally of detached notes collected from other reports; and has never been considered as of any authority.⁶ Much the best edition of Salkeld is that of Mr. Evans, the translator of Pothier, in 3 vols. 8vo., which was republished in this city in 1822.

SHOWER. DOM. PROC.

6 WM. III.—11 WM. III. (1694—1699.)

Of course, not to be confounded with Shower's *reports*; which are in the K. B.

¹ Vol. i. 495.² Clarke.³ 2 Term R. 776.⁴ Willes 182.⁵ 1 Wilson 15.⁶ 7 Mod. 269; 2 East. 8; 8 Mass. 258.

LORD RAYMOND. K. B., C. P.

6 WM. III.—7 GEO. II. (1694—1734.)

The beginning of the 1st vol. having been taken when the reporter was quite young, and designed merely for private use, is not considered as very accurate.¹ The 3d vol. contains the pleadings at large, published by Wilson; and these, according to chancellor Kent, are valuable.²

FORTESCUE. K. B., C. P., EX. & CH.

7 WM. III.—11 GEO. II. (1695—1738.)

COMYNS. K. B., C. P., EX., CH. & DELEG.

7 WM. III.—14 GEO. II. (1695—1741.)

COLLES. DOM. PROC.

9 WM. III.—13 ANNE. (1697—1714.)

This is a supplement to Brown's cases in parliament.

BROWN. DOM. PROC.

1 ANNE.—41 GEO. III. (1702—1801.)

Brown's cases in parliament, properly so called, do not come down to the present century by many years; the author having died before his work was completed. The work was continued by Mr. Tomlins.

PRACTICAL REGISTER. C. P.

3 ANNE.—15 GEO. II. (1704—1742.)

Lord Hardwicke spoke of this book as one which, though not of authority, was yet better collected than most of the kind;³ and in *Mitford's Pleadings*, p. 7, n., it is characterized as a book of little authority, but as one which is cited occasionally where no better authority can be found.

¹ 1 Bur. 36; 3 D. & E. 261.² 1 Com. 488.³ 2 Atk. 22.

GILBERT. EQ., EX. IRISH EX.

4 ANNE—13 GEO. I. (1705—1737.)

COOKE. C. P.

5 ANNE—20 GEO. II. (1706—1747.)

These decisions are upon points of practice, and the book is not often cited.

SESSIONS CASES. K. B.

9 ANNE—31 GEO. II. (1710—1748.)

BUNBURY. EX.

12 ANNE—15 GEO. II. (1713—1742.)

Lord Mansfield characterized these reports as “very loose notes,” which were never designed by Mr. Bunbury for publication.¹ And see 5 Wendell 578.

STRANGE. K. B., C. P., CH. & EX.

2 GEO. I.—22 GEO. II. (1716—1749.)

These reports, according to my observation, have always been regarded as of good authority; and this idea seems to be confirmed by chancellor Kent.² But sir Michael Foster referring to one case in particular, “cannot help saying, that the circumstances omitted in the report are too material, and enter too far into the true merits of the case, to have been dropped by a gentleman of sir John Strange’s abilities and known candour, if he had not been over studious of brevity.”³ However, a new edition of Strange’s reports was published by Mr. Nolan in 1795, who says, that it has been his “first object to clear up those few passages in which the author from his conciseness, is liable to the imputation of obscurity, and to mark those still fewer places, in which he seems to have fallen into errors.” Yet, even of Strange, thus revised,

¹ 5 Bur. 2658.² 1 Com. 488.³ Reports, &c. 294.

sir Anthony Hart is made to say, that it is not "a book we can place much confidence in."¹

Sir Anthony Hart doubtless is respectable authority; but, *pace tanti viri*, it may be observed, that the modern equity lawyers do distinguish cases so much by touches and shading, that perhaps the vice-chancellor would be regarded as fastidious by the common lawyer; who, in the portraiture of a case, would look for nothing beyond the outline and principal features.

There is a volume in existence called *Select Cases on Evidence*. The work is generally attributed to sir John Strange; but having, for some cause, been suppressed, is very rarely to be seen. Several of the cases in it are found in Strange's reports.

BARNADISTON. K. B.

12 GEO. I.—8 GEO. II. (1736—1735.)

Not to be confounded with Barnadiston's chancery cases.

Barnadiston was a very careless fellow, and his reports, as well of chancery cases as in the K. B., were, for a long time, but little esteemed.² The former book lord Mansfield absolutely forbade to be cited; "for it would only be misleading students to put them upon reading it." He said it was marvellous, however, to those who knew the sergeant and his manner of taking notes, that he should so often stumble upon what was right; but yet that there was not one case in his book which was so throughout.³ Douglas, likewise, calls the K. B. reports, of still less authority than 10 Mod.,⁴ and lord Kenyon spoke of the author as "a bad reporter."⁵ Lord Lyndhurst, too, when Mr. Preston cited a case from the chancery cases, exclaimed: "Barnadiston, Mr. Preston! I fear that is a book of no great authority: I recollect in my younger days it was said of Barnadiston, that he was accus-

¹ 1 Simons 432.

² 2 Doug. 689, n.

³ 1 Doug. 333, n.

⁴ 2 Bur. 1142, in marg.

⁵ 1 East 642, n.

tomed to slumber over his note-book, and the wags in the rear took the opportunity of scribbling nonsense in it." But Mr. Preston is reported to have replied: "There are some cases, my lord, in Barnadiston, which, in my experience (and having had frequent occasion to compare that reporter's cases, with the same cases elsewhere), I have found to be the only sensible and intelligent reports; and I trust I shall show your lordship that it may be said of Barnadiston, "*non omnibus dormio*." And on another occasion,¹ lord Eldon said: "I am old enough to remember lord Mansfield (who practised under lord Hardwicke, by whom all these cases were decided) state his opinion of these reports, (the chancery cases;) for he knew the man. I take the liberty of saying, that in that book there are reports of very great authority."² In addition, the late C. B. Alexander is said by Mr. Gresley,³ to have praised Barnadiston highly.

So in 4th Vesey 488, n., the solicitor-general, sir W. Grant, in citing a case from the chancery cases, observed, "that though those reports are not approved of, they are generally in substance pretty correctly stated;" and that two MS. notes of the case which he cited, agreed in substance with the report of Barnadiston. And in 4th Term, 57, Mr. Wilson, in citing a case from the same work, said that he had compared the case with the register's book, and found it "very accurate."

And besides all this, a remark made to me by a friend, is here worth noting, viz. "that on the occasion when Barnadiston was *first* assailed, and Mr. Dunning, being forbidden to cite him, was obliged to have recourse to a MS. note, *no difference is stated to have been shown or suggested between that note, and the case as found in printed reports.*"⁴

The opinion of lord Mansfield and of his reporters, sir James Burrow and Mr. Douglas, may therefore be consi-

¹ 1 Blight N. S. 538.

² Eq. Ev. 301, n.

³ See Greenleaf's O. C. 26.

⁴ 2 Bur. 1142.

dered, like a good many of his lordship's other opinions, as now overruled.

FITZGIBBONS. K. B., C. P., EX. & CH.

1 GEO. II.—6 GEO. II. (1728—1733.)

Styled by lord Hardwicke, a book of no great authority;¹ though the chancellor admits that the case cited is truly reported. The volume received a similar character from sir John Strange, when solicitor-general,² though no such case as Andrews reports to have been cited (the *King v. Mann*), is to be found in Fitzgibbons. It should probably be *King v. Morrice*, which is reported at p. 198.

LEACH. K. B. (CROWN SIDE.)

3 GEO. II.—55 GEO. III. (1730—1815.)

BARNES. CASES OF PRACTICE.

5 GEO. II.—34 GEO. II. (1732—1760.)

Sir Fr. Buller, in a case where he subverted a decision as reported in this book, spoke of Barnes as a writer "who has indeed, in general reported the practice of the court with accuracy;" but whose assertion in the particular case "is unsupported by authority, and contradicted by reason."³ Mr. justice Heath, on another occasion,⁴ in referring to a case from Barnes, went further, and said that the case cited had been overruled; and that indeed "many cases reported in that volume are not law;" and Mr. Williams, of the New York bar, once styled Barnes "an authority of little weight;" and said "his cases are so contradictory that they destroy each other." The question before the court being one of practice, chancellor Kent, neither affirming nor denying the position of Mr. Williams, yet said that the cases cited from Barnes were good as historical evidence to prove

¹ 1 Ves. 10; 3 Atkyns 610. ² Andrews 75. ³ 1 B. & P. 333. ⁴ 3 B. & P. 245.

the point of practice in issue.¹ It is probable that Mr. Williams and Mr. justice Heath went rather too far, and that our own chief justice Gibson, expressed the true state of the case in 1 Watts 490, where with his usual precision he says, "*Barnes is good authority, I believe, for points of practice, though for little beside.*"

The paging of the 4to. and 8vo. editions of Barnes, do not agree.

RIDGEWAY. K. B., CH.

7 GEO. II.—11 GEO. II. (1733—1737.)

Cases during the time of lord Hardwicke. The transcendent reputation of this great chancellor, caused almost every man then at the bar, to take notes of his decisions. The present volume was printed in 1794, from a manuscript of some reputation in Westminster hall, the author of which is, however, not known. In addition to the common law cases here reported, the volume contains several decisions in chancery, between 1744 and 1746. (*See Chancery reports.*)

CUNNINGHAM. K. B.

7 GEO. II.—9 GEO. II. (1734—1736.)

Several of the cases in this volume, are reprinted almost verbatim in the work which follows.

REPORTS TEMP. HARDWICKE. K. B.

7 GEO. II.—11 GEO. II. (1734—1738.)

This book has been ascribed to Mr. Harward, a barrister of the day, but is sometimes cited as Annaly's reports: it is not known in fact, by whom the notes were taken. The volume contains some cases by lord Lee, and two equity cases by lord Hardwicke.

It must be distinguished from another book called *cases tempore Hardwicke*, and published in 1828 by Mr. West,

¹ 2 Johnson 69.

from lord Hardwicke's MSS.; and which contains chancery cases from 1736 to 1739.

WILLES. C. P., EX., CH., DOM. PROC.

8 GEO. II.—33 GEO. II. (1737—1760.)

These reports, though posthumous, are admitted to be highly authoritative. They appear to have been prepared by the chief justice himself, and were carefully revised by Mr. Durnford, their reputable editor. Willes and Wilson are probably the most authoritative reports of the reign of Geo. II.¹

ANDREWS. K. B.

11 GEO. II.—13 GEO. II. (1738—1740.)

FOSTER. K. B. (CROWN SIDE.)

16 GEO. II.—1 GEO. III. (1743—1761.)

PARKER. EX.

16 GEO. II.—7 GEO. III. (1743—1767.)

The cases embraced within the term just indicated, were prepared by sir Thomas Parker himself. But besides these, the volume contains in an appendix, some cases from 1678 to 1718. These, sir Thomas says were carefully transcribed from authentic MSS. The book is one of very good authority.

WILSON. K. B. & C. P.

PART I. K. B. 16 GEO. II.—27 GEO. II. (1743—1754.)

PARTS II. & III. C. P. 26 GEO. II.—15 GEO. III. (1753—1775.)

These reports embrace the time when c. j. Wilmot was on the bench; and being "very accurate repositories" of the decisions they report,² are of course highly interesting and authoritative. Some of Wilmot's decisions, however (from

¹ 1 Kent's Com. 488.

² Ibid.

1757-70), are found in a 4to. volume published in 1809. The volume embraces decisions and opinions in the house of lords, K. B., C. P., and Exch. Chamb.

BLACKSTONE. K. B., C. P., & CH.

20 GEO. II.—20 GEO. III. (1746—1780.)

Although these reports were ordered by sir William Blackstone's last will to be published, it has been generally thought that they were notes *pour servir*, rather than the completed reports, which, had the elegant commentator's life been spared, would have been given to the profession. Certain it is, that although there is no sort of question as to the genuineness of the reports, they have not been held in great repute. "The reports of sir William Blackstone," says Mr. justice Lewis,¹ "though the production of an able judge, are not of the highest authority. They are posthumous works, edited by his executor, who does not appear to have been a lawyer, and who has given them to the world without their having undergone the last revision intended by the author." "All the respect," says a reverend name, "we entertain for the reporter of this case, cannot prevent the opinion, that the words of the lord keeper have been inaccurately reported. If not, they were inconsiderately uttered;" (C. J. Marshall,² referring to the case reported by sir William Blackstone, p. 91.) Indeed, the bad reputation of Blackstone's reports seems to have got even into France; for in speaking of them, Dupin³ remarks: "*Ses rapports ne jouissent pas de la même estime que ses autres ouvrages, et passent pour être très-inexacts.*" Lord Mansfield, in fact, said that they were "not very accurate;"⁴ and such, for many years, was the idolatry paid to every thing which fell from the earl's lips, that this dictum was enough to give them disrepute for at least a generation afterwards. Of late, however, these reports have been well

¹ 1 Johns. Ca. 45.

² Baptist Assoc. v. Hart, 4 Wheat. 41.

³ Lettres sur la profession d'avocat, Tome II. p. 575.

⁴ 1 Doug. 93, n.

re-edited, and appear to have been more esteemed. The matter, in any event, is less important, as most of the cases in the K. B. are reported in Burrow, and most of those in the C. P. by Wilson, two of the best of all the English reporters. The improved edition of sir William Blackstone's reports, just now referred to, is one by Mr. Elsley, and was published in 1828.

SAYER.

25 GEO. II.—30 GEO. II. (1751—1756.)

“But an inaccurate reporter.”¹

KENYON.

26 GEO. II.—1 GEO. III. (1753—1760.)

These reports are from the genuine MSS. of lord Kenyon, and having been printed (in 1819—25) by the consent of his successor in the title, were probably supposed to detract nothing from the first lord's reputation. But there is no evidence that the chief justice himself ever designed them for the press. Undoubtedly, however, the authority of sir Lloyd Kenyon's MSS. (even during his lifetime) was very considerable in Westminster hall; for in *Doe v. Fonnereau*,² after a case had been argued twice and decided, the court of K. B., on the authority of a MS. of his, ordered it to be again argued, and *reversed the former decision*.

For the reporters after the reign of George II. see post; after the chancery reporters.

¹ 1 Sug. on Vend. 80.

² 2 Doug. 486.

CHANCERY.

[It is scarcely necessary to remind the professional reader, that a considerable number of chancery decisions are found among the volumes generally classed with the common law reports. Thus, the modern reports, Ventriss, Salkeld, Fortescue, Comyns, Fitzgibbons, Strange, Kelyng, Ridgeway, Blackstone, Kenyon, and other reporters prior to the reign of George III., all occasionally record cases in equity; just as, on the other hand, Peere Williams, Gilbert, and other chancery reporters sometimes preserve a note of decisions at law. Cases in the exchequer, also, were formerly thrown in with the reports of other decisions. Freeman's reports, both at law and in equity, were originally printed together; but the two sorts have, of late, been separated. See *ante*, p. 305.]

CARY.

5 MARY.—2 JAC. I. (1557—1604)

Two editions of Cary, one printed in 1650, the other in 1665, are both alike, except in the paging, which is different. A third edition was printed in 1824.

CHOICE CASES IN CHANCERY.

5 MARY.—4 JAC. I. (1557—1606.)

This is a work which I never saw but in the valuable collection of Mr. justice Kennedy of the supreme court of Pennsylvania, who spoke of it with reasonable respect. It forms part of the volume called "Practice of Chancery Unfolded."

TOTHILL.

1 ELIZ.—23 CAR. I. (1559—1646.)

In *King v. Baldwin*,¹ Mr. Burr relied upon this book; but chancellor Kent spoke of the report as "so very imperfect, and so destitute of facts and circumstances, as to be altogether

¹ 2 Johnson's Ch. Rep. 556.

unfit to serve as a guide, and unworthy to be cited as an authority." And after showing that Tothill had misunderstood two cases cited in his report, remarks: "This explanation of two cases is sufficient to show what little reliance is to be placed upon the loose notes of Tothill, which were collected and alphabetically arranged by him, in the shape of an index, and published after his death."

A new edition of Tothill was published in 1820, by sir R. O. Holborne, a bencher of Lincoln's Inn.

DICKENS.

2 ELIZ.—38 GEO. III. (1559—1798.)

Mr. Dickens was for some time register of the court of chancery, and, according to lord Redesdale, "a very attentive and diligent *register*." These reports, however, were prepared after his death, by Mr. Wyatt, from Dickens' notes; and these (says lord Redesdale,) "being rather loose, were not considered as of very high authority. He was constantly applied to, to know if he had any thing on such and such subjects, in his notes; but if he had, the register's books were always referred to."¹

REPORTS IN CHANCERY.

13 JAC. I.—11 ANNE. (1615—1712.)

The title of this book is, "Reports of cases taken and adjudged in the court of chancery, in the reign of king Charles I., Charles II., James II., William III., and queen Anne," &c. 3 vols. in one. [*See the next book but one.*]

NELSON.

1 CAR. I.—5 WM. III. (1695—1694.)

¹ Smith v. The Hibernian Mine Company, 1 Sch. & Lefroy 238.
VOL. II. 28

CASES IN CHANCERY.

12 CAR. II.—3 JAC. II. (1660—1688.)

"Cases argued and decreed in the high court of chancery:" 1st vol. 3d ed. Lond. 1730. 2d vol. Lond. 1701. With this volume is usually bound, *"Select cases in the high court of chancery, solemnly argued and decreed by the late lord chancellor, with the assistance of the judges."* Lond. 1730. This last volume contains the cases of the duke of Norfolk, and of the earls of Bath and Montagu, and comes down as far as 9th Wm. III.

The former of these works, to wit, the *cases in chancery*, is notoriously a book of doubtful authority.¹ It is usually distinguished from the "reports of cases," &c., mentioned further back, by being cited as 1st, 2d, or 3d *chan. cas.*: the other book is cited as 1st, 2d, or 3d *chan. rep.* The last named book has been generally considered as much the better book; but a competent judge, chancellor Kent, says that they are, both of them, in their general character, loose, meagre and inaccurate, and not of much weight or authority; although the chancellor remarks, that the reports of some cases decided by lord chancellor Cowper, in the third or last volume of the reports in chancery, and the cases of the duke of Norfolk, and the earls of Bath and Montagu, in the "select cases," are distinguished exceptions to this complaint; and that those cases are fully and very interestingly reported.² This last book is usually quoted short, S. C. C.

FREEMAN.

12 CAR. II.—5 ANNE. (1660—1706.)

See *ante*, tit. *Freeman*, under the common law reports, p. 305.

CASES TEMP. FINCH.

25 CAR. II.—33 CAR. II. (1673—1681.)

This book is sometimes called (incorrectly, however,) *Nel-*

¹ 10 Ves. jr. 582; 2 Ball & Beat. 183; 1 H. Black. 332, and 6 Dow 9.

² 1 Kent's Com. 492.

son's reports; the preface being signed W. N. (William Nelson.) The author, whoever he was, belonged to the scribes: his volume, at least, is not one having authority.¹

VERNON.

33 CAR. II.—6 GEO. I. (1681—1720.)

It appears from the case of *Atcherly v. Vernon*,² that Mr. Vernon's MS. reports, found in his study after his death, were the subject of a suit in chancery, between his widow, his residuary legatee, and the heir at law. The widow claimed them as included in the bequest "of household goods and furniture;" the trustees of the residuary estate regarded them as embraced by the expression, "the residue of my personal estate;" while the heir contended, that "as *guardian of the reputation of his ancestor*," the MSS. belonged to him; in the same way as would a right of action for the defacing of his ancestor's tomb. "The printing, or not printing, of these papers," says the counsel for the heir, "may as much affect the reputation of Mr. Vernon as any monument or tomb. Possibly they are not fit to be printed; possibly they were never intended to be printed." "Suppose a man of learning should have the misfortune to die in debt, can the creditors come into this court and pray a discovery of all his papers, that they may be printed for the payment of his debts? And if creditors cannot do this, *a fortiori*, not the trustees in the present case. If a minister of state should die, he may have a great number of papers that may be very curious, may print and sell well; yet surely these will not be considered as personal estate and go to the executor." Lord Macclesfield finding the decision difficult (and the parties probably thinking that it was doubtful), the dispute was arranged, by the chancellor's keeping the MSS. him-

¹ 10 Vesey, jr. 582; 1 Wils. 162; 3 Athyns 334.

² 10 Mod. 530.

self;¹ and under his direction, with that of lord King, it was that they were first published. The editors were Mr. Melmoth and Mr. P. Williams, who are supposed to be the authors of some of the marginal notes.² As it appeared, the heir had a good deal of weight in his arguments. The MSS. were not very "fit to be printed," and probably were "never intended to be printed."

Certainly, as at first published, the volumes were quite deficient in accuracy.³ But in 1806, at the suggestion of lord Eldon, Mr. Raithby favoured the profession with a new and "very valuable"⁴ edition of Vernon, enriched with learned notes and accurate extracts from the register's books. The volumes have therefore much more value now than when first published; but still, in them, we should look in vain for a monument worthy of the great men whose decisions they record, lord Nottingham, lord Somers, and lord Cowper.

Raithby's edition of Vernon has been reprinted in our own country.

PRECEDENTS IN CHANCERY.

1 WM. III.—9 GEO. I. (1689—1723.)

These notes, as far as the year 1708, are supposed to have been taken by Mr. Pooley, the author of the first volume of the equity cases abridged,⁵ and an able lawyer of his

¹ "The court," says the reporter, "decided nothing in this affair; because all consented to have them printed under the direction of the court, without making any profit of them."

² 3 J. B. Moore 701.

³ 1 Atkyns 556; 2 Ves. 610; Clarke; 8 D & E. 266; 1 H. Black. 336.

⁴ 16 Vesey jr. 24.

⁵ It may here be proper to speak of the work just mentioned, *equity cases abridged*, which, though more in the nature of a digest than of *reports*, is yet often cited. The *first* volume is regarded as very good authority, and was so admitted to be by opposing counsel in *Blount v. Burrow*.—(1 Ves. jr. 547.) And see the pref. to Viner. The second volume (the author of which is not known), is spoken of by lord Eldon (1 *Bligh N. S.* 538,) as a book "of no very high character;" "not so high in character as the first volume." But the earl

day.¹ The work is one of high authority,² though lord Rosslyn said that the case of *Harkness v. Bayley*, there, p. 514, is totally mis-reported.

The *book-sellers* sometimes call this book Finch's precedents; a person by the name of Finch having edited one edition of the book.

PEERE WILLIAMS.

7 WM. III.—9 GEO. III. (1695—1736.)

These reports, embracing a term of time when a succession of eminent men presided in chancery, were always regarded as one of the most perspicuous, useful, and interesting repositories of equity law to be found in the language.³ But they have received great additional value from the notes of their recent editor, Mr. Cox. "The bench, the bar, and the public in general (said the master of the rolls, sir R. P. Arden,⁴ referring to one of these notes,) are much obliged to him for his very valuable edition of those very valuable reports;" and the master thought that the cases relating to the law in a particular case had been so well stated, the rules so accurately and so shortly presented, and the principles so well extracted from all the cases, that he preferred to use Mr. Cox's language to his own. The same judge expressed a similar opinion of Mr. Cox's notes in another case,⁵

thought that a case which he cited, reported there, was entitled to credit; the more, he adds, because "I have found authority to consider that report to be a very correct report, in the library and in the mind, which are both equally large store-houses of equity learning: I mean the library and mind of lord Redesdale." Lord Redesdale had looked through his books, printed and MSS., and confirmed the report. So, lord Kenyon (2 *Brown's ch. rep.* 45), though he spoke of the second volume as not a book of the first authority, yet relied on a case reported there; other authorities supporting it.

¹ Pref. to 1st Viner's abdt.

² 7 Mod. 304; 5 Ves. jr. 663.

³ 1 Kent's Com. 493.

⁴ 3 Vesey jr. 130.

⁵ Clinton & Seymour, 4 Ves. jr. 463.

GILBERT.

4 ANNE.—13 GEO. I. (1705—1737.)

Reports of cases in equity. (In the chancery and exchequer, with some equity cases in the Irish exchequer.) A posthumous book, and of no kind of authority. When quoted by Mr. sergeant Wynne, 22d June, 1737, in the C. P., "the court exploded the book, and told the sergeant they hoped he would quote cases from some better authority."¹

GILBERT. CASES IN LAW & EQUITY.

12 ANNE.—1 GEO. I. (1713—1715.)

Cases in law and equity, with two treatises; one on the action of debt, the other on the constitution of England.

SELECT CASES.

11 GEO. I.—7 GEO. II. (1724—1734.)

("Argued and adjudged in the high court of chancery, before the late lords commissioners of the great seal and the late lord chancellor King; from the year 1724 to 1733, with two tables, &c." By a gentleman of the temple. In the savoy, 1740.) The title of this work is given at large, in order to distinguish it from another volume of "select cases," usually bound up with the work quoted as "cases in chancery," and mentioned *ante*, p. 320.

The present book is said by lord Redesdale (*obiter*) to be a book of no great authority.²

MOSELY.

12 GEO. I.—4 GEO. II. (1726—1731.)

When Mosely was cited before lord Mansfield, the earl told counsel that the volume was one which should not have

¹ Clarke.² 2 S. & L. 634.

been quoted;¹ and this censure for sometime disgraced the book.² His lordship, however (it must be confessed), was rather given to dispatching in this summary way, such books as reported cases with which he did not coincide. And hence we find lord Eldon (a much better judge, probably, of the merits of a chancery reporter, and infinitely cautious) making a formal entry of his dissent from the chief justice.³

He thought "*very differently*" from lord Mansfield; "having always considered Mosely's reports as a book possessing a very considerable degree of accuracy."⁴

I am not conscious that it is any where remarked, that in the case where lord Mansfield condemned Mosely, the counsel who cited the work, confirmed Mosely's report, by producing a certificate from the register's book.

It is, however, perhaps true (we may here take occasion to say), that the fidelity of sir James Burrow, in recording every thing which fell from lord Mansfield's lips, has in many cases given weight and permanence to what was a mere casual or suggestive remark, never intended to be delivered as an opinion for posterity.

KELYNG.

4 GEO. II.—9 GEO. II. (1731—1736.)

This book is cited as *second* Kelyng, or W. Kelyng, to distinguish it from Kelyng's crown cases.

CASES TEMPORE TALBOT.

7 GEO. II.—11 GEO. II. (1734—1738.)

Talbot, a name which, according to Mr. Burke, will be respectable in England, while the glory of the nation forms any part of its concern. Lord Talbot presided in chancery, but a very few years, having died in the vigour of his age. This volume, containing reports of his decisions, is regarded

¹ 5 Bur. 2629.

² 3 Anst. 861; 5 D. & E. 560; 1 Binney 213.

³ 1 Meriv. 92.

⁴ 19 Ves. jr. 488, n.

as quite accurate and valuable.¹ It is sometimes cited as Forrester's reports; the collection, as is known, having been made, as far as p. 217, by Mr. Forrester, a gentleman of considerable eminence in the profession in his time. The best edition is that by Mr. Williams.

WEST.

9 GEO. II.—13 GEO. II. (1736—1740.)

This book was first published in 1828, from original MSS., said to be by lord Hardwicke himself.

ATKYNs.

9 GEO. II.—28 GEO. II. (1736—1755.)

The uncommon abilities of lord Hardwicke, whose name fills so large a space in the history of equitable jurisprudence, render interesting even imperfect memorials of his decisions: For, "faint picture of those flashes of his spirit," must we, unhappily, regard all the records which transmit his judicial decrees to posterity.² The K. B. once forbade counsel to cite Atkyns;³ and both Buller and chief justice sir James Mansfield have expressed their vexation, at the incorrect and slovenly way in which his notes were taken.⁴ Text writers have spoken in the same way of lord Hardwicke's reporters.⁵

¹ 1 Kent's Com. 493.

² The reader who desires to see the full stature of lord Hardwicke's mind, will read with pleasure archdeacon Coxe's life of sir Robert Walpole, and the memoirs of Mr. Pelham's administration, by the same author; and also the recently published letters of the elder Pitt. In the many years of party conflict and high enterprise, during which lord Hardwicke held the seals of England, it would appear as if few important measures were brought before the council-board until after fullest consultation with the chancellor. In fact, it is obvious that in every great emergency, reliance was had on him for extrication. And while we safely believe, that in the law was the centre of his thoughts and "the home of his mind," we must admit, too, that as a statesman, fit to legislate for an empire, he was scarce less great than in that department where the world hath called him, as yet unequalled.

³ 1 Wm. Bl. 571.

⁴ 6 East 29, n., 5 Taunt. 64.

⁵ 1 Kent's Com. 494; 2 Wooddeson 362; 2 Kid on Corp. 189, n.

Of all these reporters, Atkyns, Vesey Sen., and Ambler, it is undoubtedly true that their style of reporting is jejune in the extreme, presenting frequently a defective state of facts; that the arguments, both of counsel and court, are often far from lucid, and that even the *decree* is sometimes wrongly given. Such censures are, however, more applicable to the old editions of these reporters; for among the inappreciable services of the late earl of Eldon to the chancery jurisprudence of England, are to be numbered his successful exertions to present, through modern and improved editions, the records of his *predecessors'* judgments. Cary, Tothill, Freeman, Vernon, the cases *temp.* Talbot, Peere Williams, Atkyns, Ambler, Vesey Sen., and Brown, have all within the time of lord Eldon, been presented anew to the profession: while the reports of lord Kenyon, Mr. West, Mr. Ridgeway, Mr. Cox, and Mr. Eden, give to us, now for the first time, decisions made generations ago. His lordship's veneration for precedent, and his cautious, inquiring mind, led counsel at his bar constantly to search the register's books for cases reported in print. And a taste for this research was thus generated, and has grown up in England, with the happiest effects upon modern jurisprudence.

AMBLER.

10 GEO. II.—21 GEO. III. (1737—1781.)

As originally printed, this book was regarded as of but *mediocre* value. [See *ante*, tit. *Atkyns*, 326.] A new and much improved edition of Ambler was given to the profession in 1828, by Mr. Blunt. A considerable portion of the term embraced by Ambler is traversed by Mr. Eden, in his reports published in the present century. [See *post*, tit. *Eden's reports*, p. 228.]

BARNADISTON.

13 GEO. II.—15 GEO. II. (1740—1742.)

[See *ante*, p. 311, common law reports, tit. *Barnadiston*.]

RIDGEWAY.

18 GEO. II.—30 GEO. II. (1744—1746.)

Along with some cases in the K. B., and some in the Irish courts. The volume embraces but a short term; and having been first published in 1794, long after the decisions were made, is not very often cited. It appears, however, to be an authentic work, and to have been printed from a MS. of some credit. Ridgeway is the name of the editor.

VESEY, SENIOR.

20 GEO. II.—29 GEO. II. (1747—1756.)

Much the best edition of these reports is that by Mr. Belt, in 3 volumes, including a supplement. Mr. Belt made a laborious examination of the decrees and orders as found in the register's books; corrected several of the statements in the original edition; added some MS. cases; and, in short, revised and improved the whole work. This edition has been reprinted in the United States.

KENYON.

26 AND 27 GEO II. (1753.)

Before lord Hardwicke. [See *ante*, p. 317, common law reports, tit. *Kenyon*.]

EDEN.

30 GEO. II.—7 GEO. III. (1757—1767.)

These reports, which give the decisions of lord keeper Henly, afterward lord Northington, were first edited in the year 1818, by Mr. Eden, a descendant of lord Northington, and who thus was possessed of the earl's MSS. They correct many of the errors, and in some measure remedy the imperfections of Ambler, by whom lord Northington's decisions were at first published. The work is undoubtedly one of authenticity, and the reports are presented probably in as accurate and complete a manner as it was possible to present

them, at so great a distance from the time when the decrees were given.

The reports of Mr. Cox likewise (the learned editor of Peere Williams,) contain some decisions of lord Northington, and also of lord Hardwicke.

From after the reign of George II., the reports have a much more systematized and uniform character than the volumes prior to that time; and their relative merits being sufficiently known to the profession, nothing more will be desired than to indicate their chronologic sequence.

The English reporters, when designated by years, are commonly referred to, anno regni: the Scotch, Irish, and colonial, more generally, anno Domini.

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The Scotch appeals are printed separately at Edinburgh.
See *post*.

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{ Cooper,	Points of Practice, 1837-8, vol. I.

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¹ Brown has been twice re-edited of late, once by Mr. Eden, and once by Mr. Belt the editor of Vesey Sen.

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¹ Lofft is confessedly a book of bad reputation.—(*Cooper's Bankrupt Law of America*, pref. vii. n.) In the great case of *Smith v. earl of Jersey* (2 Brod. & B. 536), Park j., said in the house of lords, when Lofft was cited, that, without forming any judgment of his own as to the merits of the book, he could only say, that in a professional life of forty years, he had never heard it cited three times; and this, notwithstanding the fact, that the volume embraced a portion of lord Mansfield's judicial life not covered by any other reporter. Lofft has been printed both in folio and octavo.

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¹ In the list which follows, the author has been much indebted to a catalogue of Messrs. Little & Brown, of Boston. The occasions are but few where he has had occasion to differ from their statement.

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Hill's Reports.	1841 to 1842, 4 vols.
Hopkins' Chancery Reports.	1823 to 1826, 1 vol.
Paige's Chancery Reports.	1828 to 1841, 9 vols.
Yeates' Select Cases.	Published in 1811, 1 vol.
Anthon's Nisi Prius Cases.	From 1808 to 1818, 1 vol.
Rogers' New York City Hall Recorder.	1816 to 1821, 6 vols.
Wheeler's Criminal Cases.	3 vols.
Hall's Reports.	For 1828 & 1829, 2 vols.
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Clarke's Chancery Reports.	1839 to 1841, 1 vol.

New Jersey.

Coxe's Reports.	From 1790 to 1795, 1 vol.
Pennington's Reports.	1806 to 1813, 2 vols.
Southard's Reports.	1816 to 1820, 2 vols.
Halsted's Reports.	1821 to 1831, 7 vols.
Green's Reports.	1831 to 1836, 3 vols.
Green's Chancery Reports.	1838 to 1841, 1 vol.
Harrison's Reports.	1837 to 1842, 4 vols.

Pennsylvania.

Dallas' Reports.	From 1754 to 1806, 4 vols.
Addison's Reports.	1791 to 1799, 1 vol.
Yeates' Reports.	1791 to 1806, 4 vols.
Binney's Reports.	1799 to 1814, 6 vols.
Sergeant & Rawle's Reports.	1818 to 1829, 17 vols.
Rawle's Reports.	1828 to 1835, 5 vols.
Wharton's Reports.	1835 to 1841, 6 vols.
Pennsylvania Reports.	1829 to 1832, 3 vols.
Watts' Reports.	1832 to 1840, 10 vols.
Watts' & Sergeant's Reports.	1841 to 1843, 4 vols.
Browne's Reports.	1806 to 1814, 2 vols.
Ashmead's Reports.	1806 to 1841, 2 vols.
Miles' Reports.	1835 to 1840, 2 vols.

Delaware.

Harrington's Reports.	From 1832 to 1839, 2 vols.
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Maryland.

Harris & M'Henry's Reports.	From 1700 to 1799, 4 vols.
Harris & Johnson.	1800 to 1826, 7 vols.
Harris & Gill.	1826 to 1829, 2 vols.
Gill & Johnson.	1829 to 1840, 11 vols.
Bland's Chancery Reports.	1811 to 1830, 2 vols.

Virginia.

Jefferson's Reports.	From 1730 to 1772, 1 vol.
Virginia Cases.	1789 to 1826, 2 vols.
Wythe's Chancery Reports.	1790 to 1795, 1 vol.
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Call's Reports.	1790 to 1818, 6 vols.
Henning & Munford's Reports.	1806 to 1809, 4 vols.
Munford's Reports.	1810 to 1820, 6 vols.
Gilmer's Reports.	During 1820 and 1821, 1 vol.
Randolph's Reports.	From 1821 to 1828, 6 vols.
Leigh's Reports.	1829 to 1839, 11 vols.

North Carolina.

Martin's Reports.	1 vol.
Haywood's Reports.	From 1789 to 1806, 2 vols.
Taylor's Reports.	1789 to 1802, 1 vol.
North Carolina Term Reports.	1816 to 1818, 1 vol.
Conference Reports, by Cameron & Norwood.	1800 to 1804, 1 vol.
Murphey's Reports.	1804 to 1819, 3 vols.
Carolina Law Repository.	1813 to 1816, 2 vols.
Hawks' Reports.	1820 to 1826, 4 vols. ¹
Devereux' Reports.	1826 to 1834, 4 vols.
Devereux' Equity Reports.	1826 to 1834, 2 vols.
Devereux & Battle's Reports.	1834 to 1840, 4 vols. 3d and 4th vols. bound in one.
Devereux & Battle's Eq. Rep.	1834 to 1840, 3 vols.
Iredell's Law Reports.	1840 to 1841, 1 vol.
Iredell's Equity Reports.	1840 to 1841, 1 vol.

South Carolina.

Bay's Reports.	From 1783 to 1804, 2 vols.
Dessausure's Equity Reports.	the revolution to 1813, 4 vols.
South Carolina Reports.	1812 to 1816, 2 vols.
Constitutional Court Reports.	1817, 2 vols.
Nott & M'Cord's Reports.	From 1817 to 1820, 2 vols.
Constitutional Reports.	1812 to 1816, 2 vols.
Constitutional Reports.	N. S. 1817 and 1818, 2 vols.
Harper's Reports.	For 1823 and 1824, 1 vol.
Harper's Equity Reports.	1824, 1 vol.
M'Cord's Reports.	From 1820 to 1828, 4 vols.
M'Cord's Chancery Reports.	1825 to 1827, 2 vols.
Bailey's Reports.	1828 to 1832, 2 vols.
Hill's Reports.	1833 to 1835, 2 vols.
Hill's Chancery Reports.	2 vols.

¹ 1 Hawks is sometimes called *Raffin & Hawks*.

Rice's Reports.	From 1838 to 1839, 1 vol.
Rice's Chancery Reports.	1838 to 1839, 1 vol.
Brevard's Reports.	1793 to 1816, 3 vols.
Riley's Chancery Cases.	1836 to 1837, 1 vol.
Riley's Law Cases.	1836 to 1837, 1 vol.
Cheves' Reports.	1839 to 1840, 1 vol.
M'Mullan's Chancery Cases.	1840 to 1842.

Georgia.

Charlton's (T. U. P.) Reports.	Cases decided previous to 1810, 1 vol.
Charlton's (R. M.) Reports.	From 1811 to 1837, 1 vol.
Dudley's Reports.	1821 to 1833, 1 vol.

Alabama.

Alabama Reports.	From 1820 to 1826, 1 vol.
Stewart's Reports.	1827 to 1831, 3 vols.
Stewart & Porter's Reports.	1831 to 1834, 5 vols.
Porter's Reports.	1834 to 1839, 9 vols.
Alabama Reports.	New Series. From 1840 to 1842, 3 vols.

Louisiana.

Martin's Reports.	From 1809 to 1823, 12 vols.
Martin's Reports.	N. S. From 1823 to 1830, 8 vols.
Louisiana Reports.	1830 to 1840, 16 vols.

Mississippi.

Walker's Reports.	From 1818 to 1832, 1 vol.
Howard's Reports.	1834 to 1841, 5 vols.

Tennessee.

Overton's Tennessee Reports.	From 1791 to 1815, 2 vols.
Cooke's Reports.	1811 to 1814, 1 vol.
Heywood's Reports.	1816 to 1818, 3 vols.
Peck's Reports.	1822 to 1824, 1 vol.

Martin & Yerger's Reports.	From 1825 to 1828, 1 vol.
Yerger's Reports.	1832 to 1837, 10 vols.
Meigs' Reports.	1838 to 1839, 1 vol.
Humphrey's Reports.	1839 to 1841, 2 vols.

Kentucky.

Hughes' Reports.	From 1785 to 1801, 1 vol.
Kentucky Decisions.	1801 to 1805, 1 vol.
Hardin's Reports.	1805 to 1808, 1 vol.
Bibb's Reports.	1808 to 1817, 4 vols.
Marshall's (A. K.) Reports,	1817 to 1821, 3 vols.
Littel's Reports.	1822 to 1824, 5 vols.
Littel's Select Cases.	1795 to 1821, 1 vol.
Monroe's Reports.	1824 to 1828, 7 vols.
Marshall's (J. J.) Reports.	1829 to 1832, 7 vols.
Dana's Reports.	1833 to 1840, 9 vols.

Ohio.

Hammond's Ohio Reports.	From 1831 to 1839, 9 vols.
Wright's Reports.	1831 to 1834, 1 vol.
Wilcox's Reports.	1840 to 1841, 1 vol.

Indiana.

Blackford's Reports.	From May, 1817, to 1838, inclusive, 4 vols.
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Illinois.

Breese's Reports.	From 1819 to 1830, 1 vol.
Scammon's Reports.	1832 to 1840, 2 vols.

Missouri.

Missouri Reports.	From 1821 to 1840, 6 vols.
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Arkansas.

Pike's Reports.	From 1837 to 1840, 2 vols.
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ART. III.—THE LEGAL DOCTRINE OF INSANITY.

THIS subject has not been selected to point out those minute shades of mental derangement, which present themselves between the extremes of mania and idiotcy, and which involve the stability of testamentary dispositions. The attempt here is not to designate the different species of insanity, or trace the various causes or symptoms, considerations of admitted importance on all inquisitions of lunacy. Our present object is to give an answer to the question, "*What degree of mental incapacity is sufficient to excuse crime?*"

There is common law authority for the doctrine of insanity, and it is an authority which is necessarily exclusive. The vicious will and the unlawful act, are the vital elements of crime; as these must combine, it becomes important to trace that want or defect of will, which can alone excuse the offender against human laws. The language of the first vinerian professor, should not be omitted in this connexion. "An involuntary act, as it has no claim to merit, so neither can it induce any guilt; the concurrence of the will, when it has its choice either to do or to avoid the fact in question, being the only thing that renders human actions either praiseworthy or culpable. Indeed to make a complete crime, cognisable by human laws, there must be both a will and an act. In all temporal jurisdictions, an *overt* act, or some open evidence of an intended crime, is necessary in order to demonstrate the depravity of the will, before the man is liable to punishment. And as a vicious will, without a vicious act, is no crime, so, on the other hand, an unwarrantable act, without a vicious will, is no crime at all. So, that to constitute a crime against human laws, there must be first a vicious will, and secondly an unlawful act, consequent upon such vicious will."

The first degree then of mental incapacity, in which the will does not join with the act, arises from a defective or vitiated understanding, as exhibited in cases of idiocy or lunacy. The existence of this incapacity is a sufficient discharge. It has been clearly and distinctly defined. It means a total perversion or absence of the intellectual faculties, an entire deprivation of the understanding and memory. The defect must be unequivocal and plain; not the mere impulse of passion, but an absolute dispossession of the free and natural agency of the human mind. But the doctrine of the common law goes further. If there be only a partial degree of insanity mixed with a partial degree of reason, not a full and complete reason, but a competent use of it sufficient to have restrained those passions which produced the crime; if in the language of the solicitor-general on the trial of lord Ferrers, there be thought and design, a faculty to distinguish the nature of actions, to discover the difference between moral good and evil, then upon the fact of the offence proved, the judgment of the law must take place.

The case of lord Ferrers was a plain case of partial insanity. It was proved before the house of lords, on his trial, that he was occasionally insane, and incapable from his insanity of knowing what he did, or judging of the consequences of his actions. But the murder was attended with circumstances indicative of deliberation; and it was the evidence of the crown that when he committed the crime, he had capacity sufficient to form a design and know its consequences. The judgment of that high court of judicature was, that a complete possession of reason was unnecessary, and that it was sufficient if the party had such possession of reason as enabled him to comprehend the nature of his actions, and discriminate between moral good and evil.

Arnold who was tried before justice Tracy for maliciously shooting at lord Onslow, was to a certain extent deranged; but it appeared that he had formed a regular design, and prepared the proper means for carrying it into effect. It was

one of the observations of the learned judge in that case, that it was not every kind of idle and frantic humour of a man, or something unaccountable in his actions, that would constitute that mania which would exempt him from the hold of the law; but that when a man was totally deprived of his understanding and memory, and did not know what he was doing any more than an infant, a brute, or a wild beast, he would properly be exempted from justice or the punishment of the law.

Billingham's case was tried at the Old Bailey, before chief justice Mansfield, on the 15th May, 1812. A part of the defence was insanity; and upon that portion of the case, the chief justice stated to the jury, that in order to support such a defence, it should appear that the prisoner was incapable of judging between right and wrong. That in the species of madness called lunacy, where persons are subject to temporary paroxysms in which they are guilty of acts of extravagance, such persons committing crimes when they are not affected by the malady, would be to all intents and purposes amenable to justice, and that so long as they could distinguish good from evil, they would be amenable for their conduct. And that in the species of insanity in which the patient fancies the existence of injury, and seeks an opportunity of gratifying revenge by some hostile act, if such a person be capable in other respects of distinguishing right from wrong, there would be no excuse for any act of atrocity which he might commit under this description of derangement.

These early cases have thus been referred to in detail, because they contain the true doctrine upon this great question, as exhibited in the opinions of the sound jurists of those times. They might be multiplied to a great extent; but as thus presented they are sufficient to aid us in our inquiry as to the degree of mental incapacity which must exist to excuse crime.

The result of this reference finds a sufficient excuse in that total or partial perversion of the intellectual faculties, where

the power to distinguish between moral good and evil has ceased to exist.

But there is another degree of insanity which will excuse crime. It is that *morbid delusion* of the intellect, which constitutes a sufficient excuse when the act is *the immediate, unqualified offspring of the disease*.

This doctrine was advanced by Mr. Erskine, in his defence of Hadfield; and as the law then decided would seem to conflict with the old doctrines, we shall introduce in this connexion, the facts of that case with more minuteness than otherwise would be necessary. The case itself is the illustration of a new principle.

"James Hadfield was tried in Westminster hall, in the year 1800, before a special commission, for high treason in shooting at the king in Drury Lane theatre. It was proved that he had been a private soldier in a dragoon regiment, and in the year 1793, received many severe wounds in battle, near Lisle, which had caused partial derangement of mind; and he had been dismissed from the army on account of insanity. When affected by his disorder, he imagined himself to hold intercourse with God, sometimes called himself God or Jesus Christ, and used other expressions of the most irreligious and blasphemous kind, and also committed acts of the greatest extravagance; but at other times he appeared to be rational, and discovered no symptom of mental insanity or disorder. On the 11th of May preceding his commission of the act in question, his mind was very much disordered, and he used many blasphemous expressions. At one or two o'clock on the following morning, he suddenly jumped out of bed, and alluding to his child, a boy of eight months old, of whom he was usually remarkably fond, said he was about to dash his brains out against the bed post, and that God had ordered him to do so; and upon his wife screaming, and his friends coming in, he ran into a cupboard and declared he would lie there, it should be his bed, and God had said so; and when doing this, having overset some water, he said he had lost a

great deal of blood. On the same and the following day, he used many incoherent and blasphemous expressions. On the morning of the 15th of May, he seemed worse; said that he had seen God in the night, that the coach was waiting, and that he had been to dine with the king. He spoke very highly of the king, the royal family, and particularly of the duke of York. He then went to his master's work-shop, whence he returned to dinner at two, but said that he stood in no need of meat, and could live without it. He asked for tea between three and four o'clock, and talked of being made a member of the society of odd fellows; and after repeating his irreligious expressions, went out and repaired to the theatre. On the part of the crown, it was proved that he had sat in his place in the theatre nearly three quarters of an hour before the king entered; that at the moment when the audience rose, on his majesty's entering his box, he got up above the rest, and presenting a pistol loaded with slugs, fired it at the king's person, and then let it drop; and when he fired, his situation appeared favourable for taking aim, for he was standing upon the second seat from the orchestra in the pit, and he took a deliberate aim, by looking down the barrel as a man usually does when taking aim. On his apprehension, amongst other expressions, he said that 'he knew perfectly well his life was forfeited, that he was tired of life, and regretted nothing but the fate of a woman who was his wife, and would be his wife a few days longer he supposed.' These words he spoke calmly and without any apparent derangement; and with equal calmness repeated that he was tired of life, and said that 'his plan was to get rid of it by other means;' he did not intend any thing against the life of the king, he knew the attempt only would answer his purpose."

Lord Redesdale the attorney-general, took the ground as laid down by lord Coke and by lord Hale, that to protect a man from criminal responsibility, there must be a total deprivation of memory and understanding. A position which lord

Kenyon, from the testimony of the crown, was inclined unhesitatingly to adopt. Mr. Erskine in that defence, which time and judicial recognition has dignified with authority, put the case as one of a species of insanity, in the nature of a morbid delusion of the intellect. Of a delusion where there was no frenzy, and where the relation between the act and the disease was apparent. The argument did not press that as insanity which exhibits itself in violent passions or malignant resentments acting upon real circumstances, where the ordinary perceptions of the mind have free sway. But to use his own language, "he alone can be emancipated whose disease consists not merely in seeing with a prejudiced eye, or with odd and absurd particularities differing in many respects from the contemplation of sober sense, upon the actual existence of things; but *he only* whose whole reasoning and corresponding conduct, though governed by the ordinary dictates of reason, proceed upon something which has no foundation or existence."

The doctrine thus advanced was adopted by the court; and so fully satisfied was lord Kenyon with its soundness and justice, that he delivered his opinion to the attorney-general, as the opinion of the whole court, that the trial should not be further proceeded in.

This species of insanity lies between the extremes of mania and idiocy; hence the difficulties which are daily encountered in marking and defining its traits and symptoms. It is hallucination; and to the extent to which it goes, the subject of it is as irresponsible as if he were generally insane. The form which this species of partial insanity assumes, is the entertaining of a morbid, false belief that something exists which, if it did exist, would justify the act done. The mind may be thus under delusion, and yet very acute on other subjects. The *acting* upon an unfounded *belief* is a proof of insanity; and if the belief produces an uncontrollable state of mind, the party cannot be held responsible for acts done while in that state. When the sense is so far perverted that

the party mistakes a present offered to him by the hand of a friend, for a pistol, and in self-defence he kills his friend, the act will be excused. The delusion would be in the supposition that the opposite party had a design upon his life; and he acts upon that belief, and kills in self-defence. Or he might believe the act was commanded by God, or by superior authority, as was the case of Martin, who was indicted and acquitted for setting fire to the cathedral church of York. The case of the convict who was recently tried in this country for destroying the life of a warden of one of the penitentiaries, furnishes a correct illustration of this species of insanity. The judge who tried the case recognised and enforced these principles of the law. If the prisoner, says he, apprehended that he should be punished by the shower-bath, or by a day in solitary confinement, even the delirium would not excuse the killing of the warden, because such degree of punishment would not justify mortal resistance. But if the prisoner believed the warden meant to deprive him of life in solitary confinement or with poison, then the acting on this belief would have excused him from legal accountability.

As the application of these rules depends upon the interpretation which is to be given in each particular case to the expressions of the prisoner, difficulties must occur. But they are difficulties which are not to be removed by destroying the rule. The legal principle which recognises a morbid delusion as an excuse and exemption from crime, is not to be set aside, and a new doctrine substituted which defines every idle and frantic humour, dejection of spirits or revenge, no matter what may be the exciting cause, as such insanity as will exempt a person from punishment. In civil cases the law avoids every act of the lunatic, although the delusion may be extremely circumscribed. Here there may be degrees of mental weakness, or eccentricity sufficient to sustain a commission of lunacy, and yet the party may find no favour at the bar of a criminal court. A man may be a fit subject for a commission of lunacy, but by no means does it follow that the facts

which sustain it will be sufficient to exempt him from the consequences of a criminal offence.

To excuse a man in the commission of a crime, he must at the period when he committed the offence, have been wholly incapable of distinguishing between good and evil, or of comprehending the nature of what he was doing; a state of mind distinct from that which is merely unequal to the pursuit of a regular and continued line of conduct, or the management of private affairs. The conclusion to which I have arrived from an examination of the authorities upon this subject, is anticipated in referring to them. The doctrine of the law is plain, intelligible, consistent; and it depends upon reason and common sense.

If there be a *total permanent want of reason*, as exhibited in mania or idiocy, or if there be a *total temporary want of it*, as shown in morbid delusion, the judgment of the law cannot take place.

Such are the degrees of insanity the existence of which will excuse the commission of crime. They are the only degrees recognised by the authorities. They constitute the law.

An effort has been made to create a third degree, under the influence of which, like immunity should be afforded. It supposes a case of partial insanity *without delusion*, a species of insanity which does not allow itself to be brought within the restraint of a definition. 'This was not the law of Hadfield's case. The defence did not rest on this dangerous foundation. The counsel distinctly disclaimed it. It is a doctrine which the law abhors. As if the man who broods over injuries actually received, the process acting upon some mal-conformation of the mind ending in insanity, should not be accountable to human laws and be made an example to deter others. It can never be that he who exhibits violent passions or malignant resentments, springing from real circumstances, can be placed in the same position with him who is impelled to evil by some morbid delusion. Nor, do the revered authorities of

the law in any way sustain a doctrine that is so well calculated to disturb the order of society, and bring confusion on the country.¹

There is no partial insanity where delusion does not exist. This is the true test. The partial insanity which is claimed for those who act upon *existing facts* and human resentments, observation has shown, is of that temporary character which places its object in a state of convalescence when the judicial investigation has closed. In this, surely the safety of the true doctrine is discernible.

That a feeling of insecurity must prevail when the plain doctrine of law shall give place to the teachings of the modern school, is a consequence which is inevitable. Even now a solemn appeal has been made to the judiciary to proclaim the law *as it is*.

Within the last few months the attention of the house of lords was called in an impressive manner, to the abuse of the plea of insanity in criminal cases. The circumstances under which this appeal was made, are thus described in a periodical of the day. "A gentleman in the vigour of life, of most amiable character, incapable of giving offence or doing an injury to any individual, was murdered in the streets of the metropolis in open day. The assassin was secured, was committed for trial, that trial had taken place, and he had escaped with impunity." The mind of the British public had become intensely excited upon this exhibition, and the impression had strengthened, that the laws relating to insanity were inadequate to secure the safety of the subject.

Lord Lyndhurst in introducing the case to the peers, was not insensible to the circumstances, which had created a deep impression in the house and among the public. With him the matter was rendered more difficult, from the fact that the nature of partial insanity was but imperfectly understood. That such a malady was known to the law and would excuse the offender, he most decidedly admitted. The doctrine

¹ See Hadfield's case.

of morbid delusion, was a doctrine of law. The lord chancellor cited the opinions of the different judges, beginning with justice Le Blanc, in 1812, and ending with lord chief justice Denman, in 1840. The latter was delivered on the trial of Edward Oxford, who was indicted for high treason, in shooting at the Queen on the 10th of June, 1840. On that trial, it was the opinion of the whole court, that if the prisoner was labouring under that species of insanity which would indicate that he was not aware of the nature, character, and consequences of the act he was committing, he would be excusable; or in other words, if he was under the influence of a diseased mind, and was really unconscious at the time he was committing the act, that it was a crime. Lord Lyndhurst, moreover, thought that it would be futile to attempt to define or describe the particular sort of disease that would be sufficient to excuse the violation of human laws, nor could the evil be remedied by any alteration of the law, or its mode of administration. Lord Brougham was not silent upon this announcement. He said that if the offender against the law, knew that he was killing a man, and that it was an act which the law had forbidden, that was a test of his sanity; it was the sound, consistent, and true test. The difficulty in his opinion, was not in the law, but with the judges, who did not always use the same language in laying down the law of responsibility.

The subject introduced to the peers, under the auspices of high authority, was ably and dispassionately discussed by nearly every member of the house; and the lawyer will feel a just pride on rising from its perusal, to find that the integrity of the law was so entirely maintained. These deliberations resulted in an unanimous request that the lord chancellor should take the opinions of the judges, in order that a more authoritative declaration of the law should be promulgated, than that which could emanate from the debates of a deliberative assembly.

In pursuance of this request, several questions, five in num-

ber, were proposed to the judges. Of the five, three referred to questions of evidence. The first and fourth touch the great question of legal accountability, and as read by lord chief justice Tindal, are in substance as follows:

“What is the law respecting alleged crimes committed by persons afflicted with insane delusion, in respect of one or more particular subjects or persons; as for instance when at the time of the commission of the alleged crime, the accused knew he was acting contrary to law, but did the act complained of with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some supposed public benefit?” The judges were of opinion that in the case supposed, the party was equally guilty with a sane person.

“If a person under an insane delusion as to existing facts, commits an offence in consequence thereof, is he thereby excused?” The judges said, if the delirium was only partial, the party accused was equally liable with a person of sane mind. If the accused killed another in self-defence, he would be entitled to an acquittal; but if committed for any supposed injury, he would then be liable to the punishment awarded by the laws to his crime.

These opinions in relation to monomania are nothing more than a recognition of the authorities upon which the well tried principles of the law are founded. They were given to counteract heresies, which are so well calculated to introduce confusion and disorder in the most important department of the administration of justice.

The times would seem to have justified this solemn call on the judiciary. We are inundated with works upon this subject by medical writers, until the question of responsibility has become tangled in the extreme. Homicidal tendencies, and homicidal propensities, are the questions for discussion, and modern writers are quoted and relied upon to sustain the affirmative of that abused proposition, that the very proneness to homicide, is of itself a state of insanity, of an insanity more-

over that does not remove its object from the public eye, or designate any mode of treatment by which an example might be rendered effective to the public mind.

The report of the judges has placed the whole doctrine of insanity within those intelligible limits, which years before were marked out by Mansfield and Kenyon. As a doctrine of law, it is certain and well defined; it addresses itself to our reason, while at the same time it secures the safety of all.

ART. IV.—ENGLISH LAW REFORM.

A GREAT change within a very few years has come over the British public. Having rested steadily for a long period on the settled opinion and prejudices of their ancestors—to an extent which has been considered remarkable and characteristic of the people—they seem suddenly to have left their old moorings, and launched boldly forth at once into the wide ocean of experiment and change. The Catholic emancipation and reform bills were the commencement of this new era. That they should have been the initiative steps to the introduction of more liberal and free principles of government and political economy, was naturally to have been expected. Law reform seems however even to have gone ahead of this, and is advancing with rapid strides, whether too rapidly or not, is a question which it is not now proposed to discuss, and to which time will give the most satisfactory answer.

A commission, composed of Mr. justice Wightman, and Messrs. Austin, Amos, Bellenden Ker, Starkie, and Jardine, have been and are still under the auspices of the government engaged in the revision and codification of the law of crimes

and criminal procedure. They have made several valuable reports, but, the legislature have not as yet acted on them. Lord Brougham in two recently published letters to sir J. R. Graham, secretary of state for the home department, urges very strongly action upon these reports, and even recommends the appointment of a commission for the purpose of framing a *civil code* analogous to that of France. The recommendation is sustained by all the arguments which are usual and threadbare, and only presented by the terse and nervous diction, and happy illustrations of the late lord chancellor, in a more striking and attractive form.

We venture upon an extract, for the purpose of accompanying it with a few remarks.

“ ‘I will name another authority, but of a different kind. Mr. Bentham thus wrote in recommending a code, which he lived not to see attempted. The following is the language of those whom Napoleon employed to prepare the code which he actually made the law of his empire. ‘*Le législateur,*’ say these enlightened and learned lawyers, ‘*ne doit pas perdre de vue qu’il faut être sobre de nouveautés en matière de législation, par ce que s’il est possible dans une institution nouvelle, de calculer les avantages que la théorie nous offre, il ne l’est pas de connaître tous les inconvénients que la pratique seule peut découvrir; qu’il faut laisser le bien, si on est en doute du mieux; qu’en corrigeant un abus, il faut encore voir les dangers de la correction même; qu’il seroit absurde de se livrer à des idées absolues de perfection dans des choses qui ne sont susceptibles que d’une bonté relative; qu’au lieu de changer les lois, il est presque toujours plus utile de présenter aux citoyens de nouveaux motifs de les aimer; que l’histoire nous offre à peine la promulgation de deux ou trois bonnes lois dans l’espace de plusieurs siècles; qu’enfin, il n’appartient de proposer des changements, qu’à ceux qui sont assez heureusement nés pour pénétrer, d’un coup de génie, et par une sorte d’illumination soudaine, toute la constitution d’un état.*’— *Conférence du Code Civile, Disc. prelim.* p. xviii. In digesting the French laws, and making, for the first time, an abridgement of them, we have followed the example of Mr. Bentham, and have endeavoured to present to the public a code which is not only more complete, but also more useful than any which has hitherto been published in France.

form rule for the whole country, it was manifestly impossible to act entirely according to these very cautious maxims, because the customary law in very many places was of necessity to be abrogated, and a new system substituted in its place. The same thing cannot in any way be said of this country, hardly of any other country in Europe except France. But the shortest and simplest answer to the objection which I have mentioned, is the undeniable fact, that they who insist upon the right of the subject to the inestimable benefits of a clear and intelligible statement of the law, and upon the duty of the government to furnish one in return for the obedience which it exacts to that law, meddle not at all with any legislative improvement: they only require an explicit and well designed statement of the law as it actually exists.”¹

The arguments usually built upon the codes of Justinian and Napoleon—which have maintained and are likely to maintain their stand so long, as systems of written reason, and as having operated so beneficially in the countries for which they were intended—are not fairly applicable to a country in which the common law of England has grown up.

England has been called the “paradise of customary law.” The common law of that country is allowed to be only the general custom of the realm, commencing, perhaps, originally in express legislation—ancient statutes worn out of use, which may never have been committed to writing, or the records of which may have been lost; but unquestionably, since its yearly almost daily history is easily to be traced, for the last two centuries at least, extending and accommodating itself to the varying and increasing wants of a growing community, and exercising a power like “that silent judgment of the people which tends to correct the mistakes of arbitrary legislation.” It is not for the sake of the beauty of the figure, but its truth, that we say, that if its sources, according to lord Hale, are as undiscoverable as those of the Nile, its rise and fall, like that river, have fertilized the soil, have built up the

¹ *Law Magazine*, p. 261.

manufactures, extended the commerce, and adorned the science, literature, and liberal arts of the countries where it has prevailed. It has done all this by its peculiar adaptation to the spirit and growth of free states, by growing as a bulwark around the free institutions from the midst of which it sprang, and expanding gradually as the internal pressure of the improvement of those institutions demanded. Hence, transplanted by our forefathers from England, it has found a most congenial soil in this country.

This is not the mere declamation of one trained to the admiration of a system long familiarity with which has produced blindness to its faults. Faults and anomalies exist without number. But as far as its radical and essential principles are concerned, they are positions which stand upon the incontrovertible foundations of reason and experience.

It is by no means a new remark, that "the course of the common law naturally leads those who are engaged in its studies, to take practical rather than theoretical views of almost every department of it." Its professors and students early imbibe the opinion, that "*misera est servitus ubi jus aut vagum aut incertum*," and if they do not always go the length of maintaining, that in the great majority of cases it is of infinitely more importance that the law should be settled, than how it is settled, they have no difficulty in holding fast the safe middle ground, that all legislative changes should be rather slow and gradual reparations and additions, than the entire pulling down and rebuilding of an edifice, whose foundations and walls time has shown to be securely settled and firmly knit together. We entirely assent to the remark of a London reviewer, on the following passage from lord Brougham, which we subjoin to the extract.

"There cannot be any doubt that the providing of a code brings us nearer to this perfect, though ideal state of the law, that in which the rule being quite fixed and absolutely clear, no question can ever be raised except upon its application to the species of facts daily unfolded. The first code that is pre-

pared, may not make a very close approach to this state of ideal perfection. Its amendment, upon further experience, will bring us nearer that happy mark. It is too much to affirm, that by successive improvements with the light of experience, we shall ever come so near perfection as to be less remote from it than any assignable distance. But this we may at least assert,—that there can no limits be fixed beyond which we may not improve our code. I well remember the time when it was held vain by our political economists, and even by our statistical inquirers, to attempt ascertaining the population of any large country by actual enumeration. So many sources of error were pointed out that the task was deemed to be hopeless; and we were led to form calculations upon the much more restricted returns of births and deaths. A great deal of declamation and some ridicule is expended upon this view of the subject, among other works, in Mirabeau's large book on the Prussian monarchy. I well recollect asking Mr. Horner, when I first read that work, whether he thought there really was anything in the objection which I stated to him, he having, on account of their size, declined to read the four quarto volumes. He said he knew it was a common topic among economists, but he could not tell why; as at any rate the actual enumeration enabled us to approximate, and it was difficult to limit the degree of accuracy which might thus be attained. The opinion which I had formed against my author was thus confirmed, and upon the reason which had occurred also to me. The first enumeration was then about to be made in this island: four more have since followed, and I believe no one is now in any doubt that a very near approximation to the truth has been effected. But if the reasoning and objections of Mirabeau, and many persons in this country adopted the same view, had been suffered to prevail, we should have been deprived of a very valuable body of statistical information. The chief objectors to a code belong to the same class of reasoners.¹

¹ Brougham.

On which the reviewer remarks:

"There is not the most remote analogy between the two. Comparatively little harm could be done by an imperfect census which upset nothing, but a code would upset every thing. The best that it is well possible to conceive, would triple and quadruple litigation for many years; and a bad or fluctuating one would unsettle property and disturb domestic peace for a century. A nation undergoing lord Brougham's 'successive improvements,' would be in the condition of one of Dr. Majendie's dogs with the nerves of his head laid bare for the advancement of surgery.

"Reflect for a moment how the rich and ample pile, praised by Bentham, has been raised; not certainly by flinging the materials carelessly together without regard to size, shape, or proportion: on the contrary, every individual stone was carefully weighed, polished, squared or rounded, before it was added to the heap; or, to speak without metaphor, hardly a rule, doctrine, or principle of importance has been adopted by the courts or received the sanction of authority, without long, full, elaborate discussion, in the course of which its bearings and analogies have been placed in all conceivable lights. Many hours of argument, comprising the result of many days' study, have often been found necessary to elucidate a point, or discover what is the actually existing law applicable to a given combination of circumstances,—the argument conducted by the best advocates, and the law eventually laid down by the best living interpreters. Select the best commissioners who could be got to engage in the undertaking; and it would be absurd to suppose that they could obtain the same mastery over their materials. Yet if they did not, they would infallibly arrive at different conclusions, destroy the internal connecting links, and change the entire body of the law."¹

Though it may seem paradoxical, the common law of England, which is the basis of the jurisprudence of this country,

¹ Law Magazine, p. 264.

does possess a degree of certainty to which no general written code can lay claim. It is attested as a fact by lord Coke. "In all my time," said he, "I have not known two questions made of the right of descents, of escheats by the common law, &c., so certain and sure the rules thereof be, &c." It was from statutes "overladen with provisos and additions, and many times on a sudden penned, or corrected by men of none or very little judgment in law," that the great mass of litigation arose in his day. His observation is confirmed, it is believed, by the observation of every one practically engaged in the administration of justice. Let the reader take up the English books, and strike from them all the cases which have grown out of the statute de Donis, of uses, of wills, and of frauds, not to speak of others less important and less productive of controversy, and he would be surprised perhaps at finding to how small a compass they would be reduced. It is not pretended by this course of remark, to maintain that the common law was originally a perfect system, and could by degrees have entirely adapted itself to the advancing state of society without legislative interference. But it is a practical comment upon the idea, that a written code to take the place of the maxims, rules, and precedents which form the common law, would tend to produce certainty and save expense and law-suits. The statute of frauds was framed by men as profoundly learned, as ingenious, and acute, as any of which the present day can boast—with more care and consideration, too, than could be bestowed by men, engaged in the construction of an immense pile, upon the strength, stability, and symmetry of all its particular parts—yet, at a low estimate, many years ago it had cost the British nation a million of dollars to settle the construction of a single line of it, and the pecuniary cost was by no means the least of its evils.

The certainty of the common law may be traced to two principal and efficient causes. The first is the trial by jury, the constitution of which tribunal and its appropriate functions in the system have preserved a clearly drawn line of

demarcation between the law and the facts of every case. The other is the stern and for the most part unyielding character of the maxim *stare decisis*. To a certain extent it is true that the courts have held themselves "bound by authority as firmly as the pagan deities were supposed to be bound by the decrees of fate." The *authority* of a case, it is to be observed, is not the *reasoning* of the judges, but the *judgment* of the court upon the facts. Though there be judges and writers entitled to all the veneration accorded to Papinian, and perhaps as well worthy to be styled "*juris asyllum et doctrinæ legalis thesaurus*," there is none whose mere *dictum* is received as *law*. The principles and rules applicable to every case, are publicly discussed by men who have made those principles and rules their study, and who, stimulated by the desire of success, and at times by the hope of reward, do not fail to exhaust all their learning and ingenuity. Standing *super antiquas vias*, the judges who decide bring to their resolution more light and learning than can possibly be attained by the solitary student theorising in his chamber.

The civil or Roman law on the contrary, has been a system of codes from its very beginning. The foundation of it was on the one hand the twelve tables, answering to our common and statute law, a series of strict and positive provisions; and on the other hand, the prætorian edicts tempering the positive law by equitable interpretation and procedures, answering in some measure to our idea of chancery. These prætorian edicts were at first the mere temporary rules annually published by each prætor upon assuming his office, for the government of his own conduct in the trial and decision of causes; but as was natural, such of these rules as were approved by experience, were adopted by successive prætors, and acquired a kind of customary authority, which it would have been dangerous to have disregarded, and which wise men occupying that post and feeling the value of certainty upon the peace and security of society, would be loth to disregard apart from the influence of public opinion. The edicts

thus passing from prætor to prætor, and forming the law of the prætorian jurisdiction, were termed *tralatitia*, to distinguish them from the mere temporary edicts occasionally promulgated by those early chancellors. There is a very striking analogy, which we may here pause to remark, between this progress of the prætorian law in Rome, and that of equity in England. Equity is not now in England, if it ever was, a word *synonymous* with *discretion without rule*. From the year 1673, and the chancellorship of sir Heneage Finch, from which period the court of chancery dates the establishment of its jurisdiction upon a broad and rational foundation, equity has been an expansive system, with rules, principles, and precedents, both as to the jurisdiction and the mode of its exercise, imperative upon the chancellors. In the language of lord Redesdale: "Principles of decision adopted by courts of equity, when fully established and made the grounds of successive decisions, are considered by these courts, as rules to be observed with as much strictness as positive law." And indeed a very eminent English lawyer (sir Edward Sugden), who has made this branch his peculiar study, does not scruple to affirm, that "there are now many settled rules of equity, which require to be moderated by the rules of good conscience, as much as the most rigorous rules of law did before the chancellors interfered on equitable grounds." Equity in England is a wise, though artificial system, built up by time and experience, whose object in general terms may be stated to be, to assist and advance the remedies provided by law for specific wrongs, to afford a remedy for cases where there is none at law or where the common law remedy is inadequate to the ends of complete justice, to relieve against the abuse or to allay the rigour of the law in certain cases, but in no case to contradict or overturn its grounds or principles. The forensic difference between law and equity, is principally in the machinery of the latter. The rules of property, which settle the distribution of the estates of intestates, which regulate the forms and solemnities of con-

tracts, the express provisions of the statute law, the canons of interpretation and the rules of evidence, are as inflexible in courts of equity as courts of law. The advantages of the equity jurisdiction are, that it addresses itself to the conscience of the party, and draws from him the truth which may lie solely in his own knowledge, and which it may be essential to justice to discover. Its remedies are frequently preventive, by enjoining a defendant from doing that which he has threatened, or continuing that which he has begun, to the injury of the plaintiff's right; a result which in general cannot be reached by common law process. "But the greatest and most useful head" of chancery jurisdiction, as lord Hardwicke has styled it, "is the power of decreeing the specific performance of contracts." Much of the same character, as would appear from all the information we possess, belonged to the prætorian jurisdiction at Rome. *Jus autem civile est quod ex legibus, plebiscitis, senatus consultis, decretis principum, auctoritate prudentium venit. Jus prætorium est, quod prætores introduxerunt adjuvandi vel supplendi vel corrigendi juris civilis gratia, propter utilitatem publicam; quod et honorarium dicitur ad honorem prætorum sic nominatum.* There were, *actiones civiles et prætoriz; obligationes civiles et prætoriz.* The prætor was therefore called *custos, non conditor juris; judicia exercere potuit; jus facere non potuit; dicendi non condendi juris potestatem habuit; juvare, supplere, interpretari mitigare jus civile potuit; mutare vel tollere non potest.*²

To the twelve tables and the *edicta prætorum*, succeeded the *responsa* of the jurists and the constitutions of the emperors. In the beginning of the fifth century, the legal sources are said to have been theoretically the old enactments of the *comitia*, the *senatus consulta*, the edicts of the Roman magistrates, the constitutions of the emperors, and the unwritten customs, the twelve tables being considered as the basis of the whole, and all late changes being referred to them as

¹ Dig. l. 1, l. 1, l. 7. Id. tit. 3, l. 10. ² 1 Story on Equity, p. 6, & n. 3.

additions or alterations. Practically, however, the writings of the great jurists and the constitutions, were alone consulted as authority. The writings of the jurists were very expensive and voluminous. A profound writer, speaking of this period, after remarking that the jurists on many subjects entertained very different opinions, observes, that "the decision of law suits in these circumstances must infallibly have been either exceedingly difficult or unsteady and arbitrary." It was at this period that Valentinian III. established his celebrated constitution, A. D. 426, which was intended to remedy this inconvenience. By it, the works of the five jurists, Papinian, Paulus, Gaius, Ulpian, and Modestinus, received the sanction of imperial authority, with the exception of the notes of Ulpian and Paulus on Papinian. In points upon which there was a difference of opinion among these writers, the opinion of the majority was to prevail: if equally divided, the opinion of Papinian was to be taken as law; and when he was silent, the case was to be referred to the judge. Upon the extinction of the western empire, there were to be added to the legal sources already enumerated, the Gregorian and Hermogenian codes, the code of Theodosius II. and the separate *Novellæ*; and as even these were beyond the impaired mental powers of the age, they were soon succeeded by the edict of the east Goth, Theodoric, the west Gothic *Breviarium* of Alaric II.; the Papian among the Burgundians, and the laws promulgated by Justinian at first only for the eastern empire. Such was the mass of the Roman laws. Of its character we can have little doubt, when we consider how large a portion must have consisted of the imperial constitutions; the rescripts, decrees, and edicts; or the opinions and decisions of such ignorant princes as Commodus and Caracalla, upon questions of law. These were the materials upon which Tribonian and his associates were compelled to labour.

Their great work has been subjected to the ordeal of severe and just criticism. But though all its parts have their faults,

and it was accomplished in much too short a period of time to be well and accurately done, yet it still lives, and will continue to live. It is indeed but a digest of the learning of the Roman *jurisconsults*, who lived in the highest and most flourishing periods of the Roman law. The Institutes, as appears from the late discovery of Mr. Niebuhr, so late as 1816, are almost entirely copied from the Institutes of Gaius, and much merit is withdrawn from the character of Tribonian as a jurist and writer, by that discovery. The Pandects are a compilation of various parts of the writings of distinguished lawyers, mostly in their very language, *ipsissima verba*, and containing the embodied wisdom of the Roman people in civil jurisprudence for near 1200 years; the world has ever since had recourse to it for authority and direction upon public law, and for the exposition of the principles of natural justice. The code is a collection of the imperial statutes, simplified and altered from Hadrian to Justinian.

The civil law beyond a doubt deserves all the commendation which has been bestowed upon it. "The whole body of the civil law," says Kent, "will excite never-failing curiosity, and receive the homage of scholars, as a singular monument of wisdom. It fills such a large space in the eye of human reason; it regulates so many interests of man as a social and civilized being; it embodies so much thought, reflection, experience, and labour; it leads us so far into the recesses of antiquity, and it has stood so long 'against the waves and weathers of time,' that it is impossible, while engaged in the contemplation of the system, not to be struck with some portion of the awe and veneration, which are felt in the midst of the solitudes of a majestic ruin." Nor is the eulogium of Gravina, though high wrought, exaggerated. *Si quam habet philosophia dignitatem (habet autem hominum opinione maximam,) ea omnis translata fuit in jurisprudentiam Romanorum, qui partum armis imperium, juris commercio, legum que majestate continuerunt. Quidquid enim a Græcis philosophis de honesto et justo, de finibus bonorum et malorum,*

de regendis populorum moribus, de legibus et republica, questionibus infinite propositis, et ambitiosis—magis quam utilibus disputationibus effundebantur, totum collectum fuit a juris consultis nostris, atque, nugis excussis, traductum in urbem: ut quod apud Græcos exercitatio erat ingenii, longiorisque otii levamen, Romæ, in corpus juris civilis conversum, publicæ et privatæ semen esset utilitatis. Itaque contemplatio Græcorum otiosa et iners, a nostris operosa reddita est atque frugifera. Cumque deinceps philosophia in honorum et opum vile mercementium converteretur, potestas omnis illius atque dignitas in juris consultorum scholis atque in Romano foro consedit.

It is evident that no argument can be drawn from this illustrious example in favour of a code of the English common law. Were it followed in exactness—the eloquent work of sir William Blackstone adopted as the Institutes—the dicta and decisions of the Cokes, Hales, Mansfields, Kenyons, Ellenboroughs, Hardwickes, Eldons, &c., compiled into a digest, and a code formed from the ample materials of the statutes and report books, to which the Institutes and digest should form only the introduction and illustration, no edict of the parliament, imperial though it be, could consign into oblivion, the volumes of genius and learning from which these materials might be extracted. The original sources would still be resorted to for the purpose of understanding and explaining the text of the code, the principles of the Institutes, and the learning of the Pandects. A *jus civile ante-Broughamianum*, would still exist a closed volume to the people, and demanding the knowledge and study of the professed lawyer: while judges themselves, despite of all prohibition to the contrary, would steal back to the old learning, to assure their consciences and confirm their judgments in the interpretation of ambiguity and obscurity in the language of the new code. For such ambiguity and obscurity would still exist; there would inevitably be *casus omissi*; the rigour of the law in cases unforeseen by the codifiers, would have to be tempered with

equity, and legislation would still have to go on. There would be a new series of report books, and controversies would take a new and fresh start—to be revived again when the lapse of a few years would again call for revision and re-codification.

About three centuries after the death of Justinian, the *Basilics* of Basilios Macedo and his son Léo Philosophus, superseded all former publications, and were the only laws in force throughout the eastern empire, till its final extinction. Indeed it is affirmed, that so entirely were the works of Justinian sunk into oblivion in the east, that among the multitude of books brought into the west after the taking of Constantinople by the Turks, not a single volume of them was found except of the novels. As to the west, the common tradition is that they were disused and forgotten, after the extinction of the Roman power in Italy, until the discovery of the *Pandects* at Amalfi, A. D. 1137. However it may be as to the works themselves, Mr. Savigny has with great industry and ingenuity, and complete success, traced the Roman law in all its great and essential features in the municipal constitutions of Italy, and other countries of Europe. The overthrow of the Roman empire by the northern nations, and the consequent intermixture of the conquerors with the conquered, gave rise to that curious system, so paradoxical to modern ears, the law of personal rights. When we assume that the law, to which every individual owes obedience, is that of the country where he lives, and that the property and contracts of every resident are regulated by the law of his domicil, it is with some degree of wonder that any other principle could ever have prevailed in any state of society. Yet in the middle ages, in the same country and often in the same city, the Lombard lived under the Lombardic, and the Roman under the Roman law. The Frank, Burgundian, and Goth, no matter where they might be, were each living under the rule of a different system. This is strongly expressed by the bishop Agobardus, in an epistle to Louis le

Debonnaire: "It often happens," says he, "that five men, each under a different law, may be found walking or sitting together." Every person lived regularly according to the law of the nation from which he was descended on the father's side. It seems to have been maintained at one time, that every one might, by free choice and without regard to descent, elect the law by which he wished to live. This Lupi has endeavoured to explode; and his opinion, which has been adopted by a modern author of eminence, is that birth determined the law, and no choice was ever allowed unless in the uniformly excepted cases of married women and ecclesiastics; and in some countries freedmen. The composition for crimes was regulated by the condition of the injured. In other suits, the law seems to have depended on that of the defendant. The validity of unilateral judicial acts, was regulated by the law of the party, as in the case of oaths and testaments. Contracts were prepared according to the law of the debtor. The whole order of succession was arranged by the law of the testator or ancestor. Marriage was celebrated according to the law of the husband. In questions affecting the property of landed estates, the personal law of the author was the rule. Runaway slaves were subject to the law of the reclaiming master. Whatever effect this system had upon the jurisprudence of western Europe, France liberally participated in. The Roman law, however, gradually lost its authority as a personal law among the Franks of the north, owing to the preponderance of Franks; and the same reason operated to produce the converse effect in the south, where the Romans by their numbers had retained the supremacy. In the north, the direct authority of the old national laws ceased. Even the name of the Salic law fell into disuse, and systems merely local, *coutumes*, occupied its place. In the south, on the contrary, the Roman law continued to prevail in its old form and exclusive character. Hence France, until the introduction of the code Napoleon, was divided into two

districts governed by different systems: *le pays de droit écrit* and *le pays coutumier*.

This brief sketch has been drawn from a few authentic sources, for the purpose of evincing that the circumstances under which the codes Justinian and Napoleon were promulgated, were such, that they can afford no argument in favour of the proposed common law code. The law of England does not present that jumbled mass which imperatively calls for authoritative order and arrangement. Nor has their principal object been attained by the codes referred to. Though, with a view no doubt to maintain its simplicity, Justinian prohibited all notes and comments upon his code, it was, soon after its revival, overladen with the commentaries of civilians to such an extent, that at the date of the code Napoleon, it was estimated that as many camels could have been loaded with books upon the Roman law, as in the time of Justinian. A distinguished legal writer states, that the present law of France is to be sought from the following sources: 1. Those portions of the old law, which the codes Napoleon have adopted: 2. The portions of the old law, upon which the codes Napoleon have no operation, and which therefore are yet in force: 3. The new law: 4. The written and unwritten law, which made a part of or was applicable to the *enacted or continued* portion of the old law: 5. Or which is applicable to it by fair argument or inference: 6. And the interpretation of the codes which has taken place since their promulgation, and which will of course continue.

To this general view lord Brougham opposes the testimony of a practical French lawyer, M. Dupin, in the following extract, to which we again subjoin the comment of the London reviewer.

“ ‘ But if you would ascertain the truth of the position that this mass of commentary and decision has destroyed the uses of the code Napoleon, hear the testimony of the first practical lawyer in France, M. Dupin; and hear him the rather, that far from being too much enamoured of codes and of prece-

dents, he had, only four years before he wrote as follows, been rather sounding an alarm himself upon the accumulation of decisions and commentaries. 'The assertion is not true' (says he, in answer to a question expressly put to him upon the subject by one of the learned digesters of the law in America), 'the assertion is not true that the proportion of decided cases has prevailed in any way against the text of our codes; nor are we in any way threatened, even at a distance, with the danger of seeing the letter of our laws disappear under the load of interpretations. In every discussion, the text of the law is first looked into, and if the law has spoken, *non exemplis sed legibus judicandum est*. If the law has not clearly decided the point in question, its silence or its error is endeavoured to be supplied. *But what country is there where decisions have not thus been used to supply the defects of legislation?*'

Upon this the reviewer remarks:

"Then why hold out an expectation that a code would make us independent of the varying opinions of the bench? No one says that decided cases have prevailed against the text, but simply that the text cannot be understood or used without them and a pretty considerable number of private interpreters to boot; in proof of which we refer to the same authority, M. Dupin. His *Bibliothèque Choisie*, in which no books are recommended but what are "*rigoureusement nécessaires*," consists of more than three hundred volumes; and in the preface to his "*Jurisprudence des Arrêts*," he says, "Nothing is so common now-a-days as the citation of adjudged cases. Men who have no other science, pique themselves at least on this. *In the country, in particular, all doctrine proceeds from them*: it is who can cite the most."¹

From these visionary theories of radical reform, let us turn to what has actually been done by the English parliament within the last year.

¹ Law Magazine, p. 266.

By 6 & 7 Vict. c. 85, which received the royal approbation on the 22d of August, 1843, entitled "An act for improving the law of evidence," it is provided that "no person offered as a witness shall hereafter be excluded by reason of incapacity, from crime or interest, from giving evidence, either in person or by deposition, in any proceeding, civil or criminal, in any court or before any judge, jury, &c., or person having authority to receive evidence; but every person so offered shall be admitted to give evidence on oath or affirmation, notwithstanding he may have an interest in the matter in question, or may have been previously convicted of any offence: provided, that this act shall not render competent any party to a suit, &c.; or the lessor of the plaintiff or tenant in ejectment, or the landlord or other person in whose right a defendant in replevin may make cognizance, or any person in whose immediate behalf an action may be brought or defended, or the husband or wife of such persons respectively; and this act not to repeal any provision of the 1 Vict. c. 26: provided also, that in courts of equity, a defendant may be examined on behalf of the plaintiff or of a co-defendant."

This statute is termed lord Denman's act, from having originated with him, and is an experiment of the utmost importance. Time only can test the value of the change. Lord Brougham has placed upon it the stamp of his approbation in the following emphatic manner.

" 'This is certainly the greatest measure that has been carried under the head of judicial procedure since the statute of frauds, that is, since the Restoration. It places the law of evidence at length upon a rational footing, and makes its provisions consistent with themselves. It protects judges, and juries, and parties from the miscarriages heretofore constantly produced by the exclusion of important testimony; wisely opening the door to the witness, but reserving the estimate of his credit and the value of his evidence to those who are to judge the cause. It also sweeps away the numberless nice and subtle distinctions in which the profession was wont to

luxuriate, disencumbers our jurisprudence of a heavy load of useless decisions, resting upon refinements and not principles, and abridges the trial of causes by shutting out those debates that used daily to arise upon the admission of proofs, which the common sense of mankind at once pronounced should be received, and which the law itself did receive in other instances, not distinguishable by the naked eye of plain reason. There have been few greater improvements in our judicial system than those which are effected by this valuable statute.”¹

We propose to devote an article to its discussion in the next number of this Magazine.

Another statute of 6 & 7 Vict. c. 96, of general importance, is entitled “An act to amend the laws respecting defamatory words and libel.” It received the royal approbation on the 24th of August, 1843, having originated from lord Campbell.

It provides, that “in any action for defamation, the defendant (after notice thereof delivered with the plea,) may give in evidence in mitigation of damages, that he made or offered an apology to the plaintiff before action, or as soon afterwards as he had an opportunity; that in an action for a libel contained in a newspaper, the defendant may plead that it was inserted without actual malice or gross negligence, and that before action brought or at the earliest opportunity afterwards, he inserted a full apology, or offered to publish it in another newspaper, &c., to be selected by the plaintiff, and on filing such plea may pay money into court as amends, as if under 3 & 4 Will. 4, c. 42; and to such plea the plaintiff may reply generally, denying the whole—that any person publishing or threatening to publish a libel, or proposing to abstain from publishing any thing, with intent to extort any money or security for money, or to induce the party to confer or procure any appointment, shall be punishable by imprisonment, with or without hard labour, for any term not ex-

¹ Law Magazine, p. 513.

ceeding three years: that any person who shall maliciously publish a defamatory libel, knowing it to be false, shall be liable to imprisonment not exceeding two years and fine; that any person who shall maliciously publish any defamatory libel, shall be liable to fine or imprisonment not exceeding one year or both: that on the trial of an indictment or information for libel, the defendant having pleaded such plea as is hereinafter mentioned, the *truth* of the matters charged may be inquired into, but shall not amount to a defence, unless it was for the public benefit that they should be published: and to entitle the defendant to give evidence of their truth as a defence, it shall be necessary for him in pleading to allege the truth of the matters charged, in the manner required in pleading a justification to an action, and also to allege that it was for the public benefit that they should be published, and the particular fact by reason whereof that was for the public benefit; to which plea the prosecutor may reply generally, denying the whole; and if the defendant be afterwards convicted, the court in pronouncing sentence may take into consideration the plea and evidence; provided that the truth shall in no case be inquired into, without such plea of justification: that in addition thereto, the defendant may plead not guilty; and that nothing in this act contained shall prejudice any defence under not guilty, which it is now competent to the defendant to make under that plea, to any action or indictment, or information for slander or libel; that where on the trial of an indictment or information for libel, under not guilty, evidence has been given establishing a presumptive case of publication against the defendant, by the act of any other person by his authority, he may prove that the publication was without his authority or knowledge, and did not arise from want of due caution on his part; and that on a prosecution by a private prosecutor for libel, the defendant on acquittal shall be entitled to costs; and on issue found for the prosecutor on a special plea of justification, he shall be entitled to costs."

ART. V.—WARRANTY.

THE statute *de donis* made an important change in the law of warranty. The power of alienation which existed before that statute, enabled all tenants of the freehold to pass the title to the lands of which they were seised, and the claims of the heir who but for the conveyance would have been entitled to the succession, were rebutted. In all cases where the warranty descended from the ancestor upon the heir, before the statute, the heir was barred. The statute restrained the warranty of the lineal ancestor without assets, but the force of the warranty still continued when it descended from one, through whom the title by descent could not by possibility be derived.

The doctrine of collateral warranty comes to us apparently fraught with absurdities, which nevertheless vanish when we consider the reasons of the ancient law. The distinctions between lineal and collateral warranty, certainly do appear to furnish unsatisfactory reasons why the latter should be binding and not the former; but it was the policy of the statute to restrain the power of alienation with the consequent warranty of him who had the estate of inheritance where the heir took *per formam doni*, because the mischief to be provided against was the alienation of the tenant in tail in possession, and not the release of a right of action, as when the collateral ancestor released with warranty to a disseiser.

It is to be observed that when the ancestor thus released with warranty, the disseiser, tenant in tail, would still have the right of entry or of action during his life, and that the issue would not be barred by the warranty, until after its descent by the death of the ancestor. It is not to be presumed that either the tenant in tail, or the issue would fail to exercise their rights, unless there were sufficient reasons to influence them.

When the tenant in tail discontinued, and the uncle of the issue released with warranty, although the issue could not be affected by the warranty of the tenant in tail, by reason of the provisions of the statute, they were barred by the collateral warranty of the uncle. This was one of the means by which an estate tail might be barred. It was not however very effectual, for it could have no operation if the uncle had issue to intercept the descent of the warranty; and on the death of the tenant in tail, the issue might always bring a formedon before the death of the uncle.

The tenant of a fee simple estate and of a fee simple conditional, after performance of the condition, had the absolute power of alienation, and the issue were as effectually barred by it without, as with a warranty. The only other case, therefore, in which a collateral warranty had any important consequences, was upon the alienation of tenant for life, when the warranty descended upon the reversioner or remainderman. As the alienation was always a forfeiture of the estate, the reversioner or remainderman might enter for the forfeiture; and if he did not enter for the forfeiture of his ancestor, but permitted the warranty to descend upon him, the presumption was certainly reasonable that he had received an equivalent by descent or otherwise.

The warranty of the collateral ancestor could so unfrequently be effectual to bar an estate tail for the reasons mentioned above, that the whole doctrine must have been practically confined to cases where the tenant for life in possession of the freehold, alienated the estate, and the warranty descended upon his heir the remainderman, and then could have no operation until after a presumed waiver of the forfeiture. Viewed in its thus restricted operation, the rule could not work injustice, and certainly does not deserve to be regarded as it appears to have been, as the reproach of the law. It might be regarded as a rule of limitation, barring the right of the reversioner or remainderman, if he did not avail himself of his right to enter for a forfeiture during the life of his an-

cestor, and certainly if aware of the rule, he permitted the warranty to descend upon him, there was a presumption that he had received an equivalent.

In most of the cases, although the ancestor was tenant for life, and his heir took the remainder by purchase (so that the warranty descended from an ancestor, from whom the estate could not by possibility descend), the heir took other property by descent, and the rule of collateral warranty was in its operation analogous to the rule of election, which required the heir whose property had been devised and for whom an equivalent had been provided in the will, to make his election, whether he would waive his right to the property devised, and consent to give operation to the whole will, or retain the property which had been devised from him.

We are not so hardy as to recommend the revival of collateral warranties, though the prejudice against them, we doubt not, is principally owing to the artificial distinction made by Littleton between lineal and collateral warranties. They have been very generally abandoned; but we believe that in certain cases which may be supposed, inequitable results have followed their abrogation.

If a man conveys land in which he has an estate for life, and his heir the remainder, to another in fee for a valuable consideration with warranty, and purchases other lands, which he allows together with the collateral warranty to descend to his heirs, it would certainly be unjust to permit the heirs to enter upon the land conveyed, and likewise to enjoy the lands descended, purchased with the consideration of the former; but since the statute of 4th and 5th Anne, c. 16, we think, even a court of chancery would have no remedial jurisdiction, under any circumstances in the case stated; and yet if the tenant for life had devised the same lands to others, in which his heirs had an estate in remainder, and had also devised other lands to his heirs, on well understood principles of equity (not, however, more cogent than those upon which the doctrine of collateral warranty was founded), the heirs

would not be permitted to enjoy the estate devised, unless they should relinquish their estate in remainder.

The statutes of Gloucester¹ restrained the operation of collateral warranty, when made by the wife, of the estate held in dower, and of the estates of tenants by the curtesy. If the doctrine of collateral warranty, as thus mitigated, had been sustained, certain cases might have been subjects of equitable relief, where it does not now appear to be admissible, because the warranty is entirely abrogated by the statute. It might have been provided, also, that the warranty of the ancestor should never operate as an absolute bar, unless it descended to the heir after a limited period from the alienation of the estate, nor unless assets were also shown to have existed in the hands of the heir.

The promotion of the free power of alienation was a principal motive for the efficacy given to warranties. The rules of law relating to warranty, enabled the tenant in tail effectually to alienate the land entailed, and the tenant for life to convey an estate in fee simple; and thus the policy of the law, by which real estate has been subjected to the unrestricted operations of commerce, was preserved.

Regarded as a rule of evidence, the presumption on which the doctrine of collateral warranty was founded, still exists, and the only practical difference between the common law rule and the existing principle, in cases where the heir has been guilty of *laches*, consists in the circumstance, that the right of the heir was at common law absolutely rebutted by the operation of a general rule, and that since the abrogation of collateral warranty, the presumption is capable of being rebutted, or is conclusive only when connected with long possession; or in the court of chancery, when the heir who has slept upon his title, seeks the aid of that jurisdiction against a *bona fide* purchaser.

S. F. D.

¹ 6 Edw. I. c. 3; and 11 Hen. VII. c. 20.

ART. VI.—POWER OF SALE.

WHETHER, if a testator directs his estate to be sold for certain purposes, without declaring by whom the sale *shall be made, the executor shall exercise the power of sale*, Mr. Sugden is of opinion,¹ that in the absence of such a declaration, if the fund be distributable by the executor, he shall have the power by implication.

It is always a question of intention; and although the authority to sell is not expressly given, the intention to vest the executor with the power of sale, may be inferred from the duties imposed, and from the necessity that the executor should receive the funds arising from the sale, to perform the trust or to make distribution.

Several cases are cited by Mr. Sugden, in confirmation of his opinion. In most of the cases the question appears to have arisen between the feoffees to uses, and the executor, or between the heir and the executor; and the question has been one of preference, and not whether the aid of the court of chancery should be invoked to supply a defective declaration of a power. In the case cited from the year-book, 15 H. 7: A man had certain feoffees in land to his use, and made his will, and willed that his lands shall be sold after the death of one A. whom he willed to have the profit during his life; which feoffees have enfeoffed others to the use to perform the will of the testator; and if the second feoffees shall sell the land or not, that was the matter.

It was said by Rede, Iremaile, and Frowik, that if a man makes his will, that his land which his feoffees have, shall be sold and aliened, and does not say by whom, there his executors shall alien that and not the feoffees. The argument of

¹ Sug. on Powers 167.

Corrisby, that the feoffees shall alien, for they have the confidence placed in them, was denied, for executors have much greater confidence placed in them than the feoffees have, for the money to arise by the sale of the executors shall be assets in their hands, and therefore they shall sell. It was conceded, that the authority created by the will must be strictly followed; that if it could not be inferred from the will that the executors had the power of sale vested in them by its provisions, it did not exist in virtue of their office; but the authority to dispose of the assets resulting from the sale, was considered as equivalent to an express authority to raise the money by a sale.

In a case reported 2 Leon. 220, pl. 276, a devise was to the wife for life; and it was provided by the will, if the deviser should not have any issue by his wife, that then after the death of his wife, the lands should be sold, and the money thereof coming, distributed to three of his blood; and he made his wife and another his executors, and died. The wife after the death of the other executor, sold the lands; and it was the opinion of the court that the sale was good, although it was not expressed in the will by whom the land should be sold, because the moneys to be derived from the sale were to be distributed by the executors as legacies. The intention to give the power of sale was implied from the duty with which they were clothed in their capacity of executors. It was said, if a man wills that his lands shall be sold for the payment of his debts, that the executors shall sell the lands, for to them it belongs to pay debts.

In a case in the 23d of Eliz.¹ a man excepted out of a devise his manor of R. which he appointed to pay his debts, and made two executors, and died; one of the executors after the death of the other, proved the will, and sold the manor, and the sale was held to be valid by the court, for the testator in investing the executors with a character from which the

¹ Dyer 371, b. pl. 3.

duty to raise money by a sale resulted, must have intended to give the power of sale.

In the former case cited from Leonard's Reports, it may be questionable, whether the testator intended that the estate should be sold during the life of the tenant for life. He probably intended that if one executor survived the wife, he should have the power of sale and of distribution.

In the case of *Pitt v. Pelham*,¹ the testator appointed his wife executrix; he confirmed certain land which was his wife's jointure, unto her; and *after her death*, he appointed it to be sold, and the purchase money to be divided between his wife and three nephews, one of whom was his heir at law. It was decided that the executrix had not the power of sale, which was to be made after her death, and that the sale by her executors would not be a good sale.

The persons entitled to the purchase money sold their equitable interest. After the death of the executrix, who died leaving executors, a bill was filed to compel the heirs of the testator to clothe the purchaser of the equitable interests with the legal estate. According to *Levine*,² the lord keeper held that the will was void, because it did not provide by whom the sale should be made. This opinion however, was overruled by the house of lords, and the heir was compelled to make good the omission.

It is evident from the discussion as reported, that in the opinion of the lord keeper, as well of the judges, if a power of sale had been required to be exercised during the life of the executrix, it would have been her duty to exercise the power of sale, as well as of distribution, and *Wyld j.* was of opinion that the executor of the executor could sell. It is evident that the testator did not contemplate a sale during the life of his wife, for after ordering the purchase money to be divided between his wife and three nephews, he gave the share of any of his nephews *dying in his wife's lifetime*, to

¹ 1 Ch. Ca. 176.

² 1 Lev. Rep. 304.

a stranger; so that the persons to whom the fund was to be distributed, were not ascertained until after her death. It was therefore a case where a power of sale had been created, and no persons appointed to exercise the authority.

The persons entitled to the avails of the property, sold their interest; and as there were no subsequent limitations, there was no necessity to resort to the court of chancery for a strict execution of the power. The purchasers as assignees, having the entire interest, had a right to demand of the heir to whom the estate had descended, a conveyance of the legal estate.

In the case of *Blatch v. Wilder*,¹ the testator being seised of divers lands, and having considerable personal estate, devised all his real and personal estate to be sold for payment of his debts, and appointed the defendant his executor. The personal estate not being sufficient to pay the debts, the plaintiffs brought their bill to be paid their respective demands out of the testator's real estate. The executor submitted it to the court whether he could safely proceed to a sale of the estate, as the testator had only given it to be sold generally, without directing who should sell. Lord Hardwicke decided that as the money arising from the sale would be legal assets, and administrable as such, it was therefore a very reasonable construction, that the executor should be the person who should make the sale. The heir was directed to join in the sale.

The question arose in the state of New York, in the case of *Davone v. Fanning*.² The testator bequeathed certain legacies to each of his seven children, "to be paid out of the bulk of the property." The will directed that so much of his real estate should be sold as should be necessary to raise money for the legacies, or when all the children were of age; but it was not expressly provided who should sell. Mr. chancellor Kent said, "I think as lord Hardwicke did in a case somewhat similar (*Blatch v. Wilder*), that it is a very reasonable construction that the power was given to the executors."

¹ 1 Atk. Rep. 420.

² 2 John Ch. Rep. 252.

The intention of the testator to give the executor the power of sale, was inferred from the power of distribution, and from the general authority to manage and dispose of the estate.

It is to be observed that the decision of the court in both of the above cases, was founded upon the presumed intention of the testator; and the will was construed to confer the power of sale, as effectually as if the authority had been expressly given. By implication, the testator constituted the agent of the will, and having appointed the manner of sale, did not intend that it should be submitted to the direction of the court of chancery.

The case of *Bentham v. Wiltshire*¹ is in no respect inconsistent with the view which we have taken. In that case, the testator gave an estate to his wife for life; and although he appointed his wife and another person his executors, and directed that the estate should be sold to the highest bidder at public auction, and the money arising from such sale to be disposed of amongst certain persons named in his will, *after payment of a small legacy*, no authority to the executors could be implied. All the duties which were imposed upon the executors, or which resulted from their office, might be performed by them during the life of the wife. The debts and legacy were payable out of the personal estate, and the sale was expressly postponed until after the death of one of the executors. The vice-chancellor, sir John Leach, decided that the executors had not the power of sale, because they had nothing to do with the produce of the sale, nor any power to dispose of it or to make distribution.

Mr. chancellor Kent in his Commentaries,² after stating the doctrine deducible from the cases on the subject, says, that "in South Carolina, the executors' authority to sell under such circumstances is denied: and the course is to apply to chancery to give validity to the sale;" and he cites *Drayton v. Drayton*,³ as showing the doctrine which prevails in that state.

¹ 4 Mad. Rep. 44.

² Vol. iv. p. 328, note.

³ 2 Desaussure's Rep. 250, note.

In that case the court say: "Upon a review of the testator's will, it does not appear that he has given any authority to the executors to sell any part of his estate, not even the lands in question, although he has directed them to be sold, in the event of his son's death, during his minority, and without issue; nor has he authorized his executors to make a division of the real and personal estate bequeathed to his son, or of his the testator's residuary estate, although he has directed that such division shall take place; so that in these respects the will is very defective. It has never been questioned, where a testator directs his real estate to be sold, but gives no power to his executors to sell, that in such cases a sale by the executors is illegal; and there have been various instances where executors in those cases have applied to the court to sanction their sale, which has always been done." It would appear, therefore, that the necessity of resorting to the court of chancery, was confined to those cases where their power of sale could not be implied from the authority to make distribution.

Mr. chancellor Kent is of opinion that the revised statutes of the state of New York have changed the law on this subject, and made it conformable to what he supposes to be the South Carolina practice. By those statutes¹ it is declared, that where a power is created by will, and the testator has omitted to designate by whom the power is to be exercised, its execution shall devolve on the court of chancery.

The learned chancellor says: "this is unnecessarily requiring a resort to chancery in every case where the executor or other donee of the power is not expressly named." But we do not thus construe the provisions of this statute. It sometimes happens that a power of sale is created, and no person is appointed to execute the power either expressly or by implication. In such cases the court of chancery is called upon to supply the defect. The sale is then effected by the officers

¹ Vol. i. 734, sect. 101.

of the court. The money arising from the sale is paid into court, and distribution and payment is made under its direction. But when a person is designated to perform any of these duties, the intention of the testator to invest him with the power of sale, is clearly implied, and the person who is to execute the power is as certainly designated as if the authority had been given in express terms.

This is the foundation of all the decisions in the cases cited. The authority of the executors or other donees of the power was recognised, not because it was reasonable that the party entrusted with the power of distribution should also exercise the power of sale, but because such was the intention of the testator. The doctrine which prevailed was founded upon a construction of the will. The authority to sell was regarded as necessary to the execution of the power of distribution, and to the management of the fund which was expressly given. The implied gift rested on the same grounds as the express creation of a power. The statute was merely declaratory. It provided for cases where the will was defective, and made it unnecessary to resort to the court of chancery for a conveyance from the heir. In all cases where a power is to be exercised, and the authority is not granted to any person, it is no longer necessary to inquire in whom the legal estate is vested; and the court of chancery will carry into effect the purposes of the testator, when the will itself does not expressly or by implication create an authority, the terms of which every testator may of common right determine. It was no part of the design of the statute to invade the right of the testator to dispose of his estate, or to delegate an authority over it. Such an attempt would have been quite beyond the legitimate sphere of legislative enactment.

The legislature cannot interfere with the right of every testator to dispose of his property according to the principles of the common law. A statute may settle rules of construction by which the intention shall be determined: but where the right to regulate the transmission of estates exists, the intention of the testator is the only subject of inquiry.

When the testator has in express terms designated the person by whom the power of sale shall be executed, this exercise of the right of property is beyond legislative control; and for the same reason the right is absolute, though the intention is ascertained by implication. It is manifest that it was not the intention of the legislature to disturb the general principles applicable to this subject. Full effect may be given to the act, without breaking in upon the rules of testamentary interpretation. It obviates the necessity of a decree against the heir, where the power of sale is created by the will; but the delegation of authority is defective, and declares the existing rule that the court of chancery shall supply the defect, but it leaves unimpaired the general rules of property and the principles of construction.

S. F. D.

JURISPRUDENCE.

DIGEST OF ENGLISH CASES.

COMMON LAW.

[Selections from 2 Queen's Bench Reports, Parts 2 and 3; 5 Scott's New Reports, Parts 2 and 3; 11 Meeson & Welsby, Parts 1 and 2; 2 Dowling's Practice Cases (New Series), Part 4;—all cases included in former digests being omitted.—The 4th and 5th parts of 3 Manning & Grainger contain no case not before digested.]

ACTION ON THE CASE. (*For fraudulent use of mark on manufactured articles—Evidence.*) The declaration stated that the plaintiff, a manufacturer and exporter of iron, had for many years been accustomed to mark iron manufactured by him for the Turkish market, with the letters W. C., inclosed within an oval figure, and had gained great reputation for the excellent quality of the iron so manufactured and marked by him; and that the defendant, wrongfully and fraudulently manufactured iron of similar form, and marked the same with a stamp or mark in imitation of the plaintiff's mark, consisting of the letters W. O. inclosed within an oval figure, which last mentioned mark the defendants well knew to be in imitation of and similar in appearance to the plaintiff's mark, and so used by them to denote that the iron so made was of the genuine manufacture of the plaintiff, and wrongfully and fraudulently sold the same as and for iron manufactured by the plaintiff. At the trial, the witnesses for the plaintiff stated that the W. O. was very likely to be mistaken for W. C. when the impression of the die was imperfect, or the iron had been exposed to the air, and that more especially the people in Asia Minor, who were

the principal consumers of the iron, were likely from their ignorance of the English character to be deceived by it. For the defendants, several witnesses stated that it was usual for iron manufacturers to mark iron according to orders received from purchasers, and it was proved that all the iron marked by the defendants with the mark so complained of, had been so marked in obedience to directions received from the merchants. Two points were left to the jury,—first, whether the mark so used by the defendants so closely resembled the mark of the plaintiff as to be calculated to deceive persons of ordinary skill and care, and to induce them to believe the iron so marked and sold to them was iron manufactured by the plaintiff,—secondly, whether such mark was so used by the defendants with a fraudulent intention to procure their iron to be received in the market as iron of the plaintiff's manufacture, or *bonâ fide* in the execution of foreign orders. The jury having found for the defendants, and the learned judge reporting that he was not dissatisfied with the verdict, the court held that the direction was correct, and refused to grant a new trial. *Crawshaw v. Thompson*, 5 Scott, N. R. 562.

2. (*Damages in—When costs of litigation by plaintiff recoverable against wrongdoer.*) In an action for running down a ship, it appeared that the plaintiff had been obliged in consequence of the injury to employ a steam-tug, the owners of which demanded 150*l.* for salvage, and commenced a suit in the court of admiralty against the plaintiff, who paid 20*l.* into court; the court ultimately decreed 45*l.* to the salvors: held, upon these facts, that the plaintiff was not entitled to recover the amount of the costs incurred by him in that suit.

Semble, that the proper question for the jury in such a case is, whether, in respect to the suit for salvage, the plaintiff pursued the course which a prudent and reasonable man would do in his own case: and that if the jury think he did, the costs of the suit may be recovered. (7 M. & W. 601; 10 M. & W. 249.) *Tindal v. Bell*; 11 M. & W. 228.

- ARBITRATION. (*Power of arbitrator to arrest judgment—Award, when sufficiently final.*) An arbitrator to whom a cause is referred, with power to direct how the verdict shall be entered, has no authority to arrest the judgment.

Where, in an action on the case by a reversioner, which was referred by order of nisi prius to an arbitrator, he awarded (*inter alia*) that the action was brought to try a right, besides the mere right to recover damages: Held, that he was not bound to state *what* was the right which the action was brought to try.

Where by an order of reference, the arbitrator is "to determine what he shall think fit to be done by either of the parties," he is not bound to direct affirmatively that something shall be done, unless he shall so think fit. Per Lord Abinger, C. B. Alderson, B., and Gurney, B.; Parke B., dissentiente. *Argus v. Redford*, 11 M. & W. 69; 2 D. P. C. (N. S.), 735.

2. (*Proceeding with reference, after death of party.*) A cause and all matters in difference were referred by an order of reference to the decision of an arbitrator, the arbitrator to make and publish his award, ready to be delivered to the parties, or either of them, "or if they or either of them should be dead before the making said award, to their respective personal representatives who should require the same," on or before a certain day. Several meetings were from time to time held, but one of the parties died before the reference was concluded. After his death the arbitrator was requested to proceed with the reference, but he declined doing so, the executrix of the deceased party having refused to attend, and protested against its proceedings: Held, that the court had no power to direct the arbitrator to proceed, or to compel the executrix to attend before him. *Lewin v. Holbrook*, 11 M. & W. 110.

3. (*Demand of performance of act directed by award.*) Although, where a demand of money payable under an award is made by a stranger, not a party to the arbitration, it must be made under the authority of a power of attorney given by the party to whom the money is to be paid, the same rule does not apply where the demand is to be of the execution of deeds under an award; and a demand thereof by an agent of the plaintiff's attorney was held sufficient to found an application for an attachment against the party for non-performance of the award. Nor was it held to be any objection, that it was the duty of the arbitrator to have prepared the deeds. *Tebbut v. Ambler*, 2 D. P. C. (N. S.) 677.

4. (*Award, when sufficiently certain.*) In ejectment, on three demises, a general verdict was taken at nisi prius, subject to a

reference of the cause and all matters in difference, the costs of the cause to abide the event. An award directing that the verdict should stand was held bad, on the ground that the arbitrator ought to have stated on which of the demises the plaintiff was entitled to succeed. (8 A. & E. 235.) *Doe d. Starling v. Hillen*, 2 D. P. C. (N. S.) 694.

BAILEMENT. (*Liability of gratuitous bailee for negligence.*) A person who rides a horse gratuitously, at the owner's request, for the purpose of showing him for sale, is bound in doing so to use such skill as he actually possesses; and if proved to be a person conversant with and skilled in horses, he is equally liable with a borrower for injury done to the horse while ridden by him. *Wilson v. Brett*, 11 M. & W. 118.

BILLS AND NOTES. (*Notice of dishonour.*) Notice in these terms, "I hereby give notice that a bill for 50*l.* at three months after date, drawn by A. on and accepted by B., and indorsed by you, lies at, &c., dishonoured"—held sufficient, without further intimation that the plaintiff looked to the defendant for payment. *King v. Bickley*, 2 Q. B. 419.

2. (*Same.*) Notice as follows held sufficient, "Your draft on C. for 50*l.* due 3d March, is returned to us unpaid; and if not taken up this day, proceedings will be taken against you for the recovery thereof." (8 Bing. N. C. 688; 2 M. & W. 799; 2 Q. B. 388; 1 Man. & G. 76.) *Robson v. Curlews*, 2 Q. B. 421.

3. (*Drawer of bill, when discharged by time given to acceptor.*) It is no defence to an action against the drawer of a bill of exchange, that the proceedings in an action against the acceptor had (without his consent) been stayed at an earlier stage by a judge's order, to pay debt and costs in three weeks, otherwise judgment. *Kennard v. Knott*, 5 Scott, N. R. 247.

4. (*Evidence to vary contract in note, when admissible, and effect of.*) It is not competent to the maker of a promissory note, in an action by the payee, to give in evidence an oral agreement to vary or contradict the express contract upon the face of the note; but a contemporaneous agreement in writing may be adduced for that purpose. In an action against one of the three makers of a joint and several promissory note payable at two months' date, the defendant pleaded that the note was made by him and delivered to

the plaintiffs as trustees of a loan society, to secure to them the repayment of money lent to one T.; that, at the time of lending the money and of making the note, it was agreed in writing between the plaintiffs, the defendants, T. and the society, that the loan and interest should be repaid by T. by weekly instalments, and that if T. should make default, notice should be given to the defendant; and that if the money was not paid according to such notice, legal proceedings should be taken upon the note, but not before, &c.: Held, that this plea was not sustained by the production of the book of regulations of the society, there being nothing (without the aid of *oral* testimony) to connect the book with the note declared on. *Brown v. Langley*, 5 Scott, N. R. 249.

5. (*Notice of dishonour.*) In an action against the drawer of a bill of exchange, the issue being whether or not the defendant had received notice of dishonour, an admission by the defendant of his liability is *prima facie* evidence (only) whence the jury may infer that he had due notice. *Bell v. Frankis*, 5 Scott, N. R. 460.
6. (*Indorsement, how far a new drawing—Account stated.*) A declaration alleged that the defendant made his bill of exchange, and directed the same to J. B., and required him to pay to the defendant's order 187*l.* 15*s.*, and then indorsed the bill to the plaintiffs. It appeared that the bill had been drawn by one F., and indorsed by the defendant in blank, and having been delivered by the defendant to F., was by him taken to a bank of which the plaintiffs were the managers, where it was received by them in renewal of another bill discounted by them, and drawn and indorsed by the same parties: Held, 1st, that proof of the defendant's being the indorser of the bill did not support the averment that he made the bill; 2dly, assuming that an indorser might be treated as a drawer, still the present indorsement, being in blank, was equivalent to the drawing of a new bill payable to bearer, and therefore the bill was misdescribed in the declaration; 3dly, that the plaintiffs were not entitled to recover on the account stated. *Burmester v. Hogarth*, 11 M. & W. 97.
7. (*Estoppel on acceptor to deny forged indorsement.*) A bill of exchange, purporting to be drawn by B. & W. (a really existing firm) payable to their order, and to be indorsed by them, was negotiated by the acceptor with that indorsement upon it. The

drawing and indorsement were forgeries: Held, that if the bill was accepted, and negotiated by the acceptor, with knowledge of the forgery, he was estopped to deny the indorsement, as well as the drawing, by B. & W.: but *semble*, that where the name of a real party, as the drawer, is forged, a party who accepts the bill in ignorance of the forgery, is estopped to deny the drawing only, but not the indorsement, although in the same handwriting. (10 B. & Cr. 468; 7 Taunt. 455.) *Beeman v. Duck*, 11 M. & W. 251.

CHARTER-PARTY. (*Pleading—Bankruptcy—Order and Disposition.*) By a charter-party, the defendants, the owners, *agreed to let* and one R. S. *agreed to hire* the ship *Mass*, for and during the term of six calendar months, upon the terms and conditions that during the term of that agreement, or as thereafter provided, the freighter should possess the entire and exclusive use and disposal of the whole reach and burden of the ship, with exception of the space occupied with the cabin, together with the room for the usual accommodation of the crew and for the stowage of the ship's stores and provisions; that the master should from time to time, and as often as the interest of the affreighter should require, take on board and properly stow all such lawful goods to the extent of a full and complete cargo, if required, as should be tendered to him for that purpose, and proceed therewith upon such lawful voyage or voyages as he the said affreighter or his agents should direct him to do, and that he should deliver the said goods and merchandise agreeably to the bills of lading, that *the freight* and *primage* for such goods *should be payable to the affreighter* or his order; that in the event of the completion of the six months whilst the vessel was upon a voyage, or after she had commenced taking goods on board for a voyage, the term of that agreement should be prolonged until the discharge of her cargo after her arrival at or return to a port in Great Britain; the owners or master to keep the vessel tight and manned, provisioned and fitted with necessary stores; in consideration of which the affreighter agreed to pay to the owners at a certain rate per ton per month, to be paid by one month's pay in advance, in cash, one month after the vessel should be entered outwards, one month's pay that day two months, and one month's pay at the expiration of each succeeding

month till the end of the term she might be employed, and the balance in cash *on her final discharge*, together with port charges, &c.; the charterer to have the privilege of putting in a master of his own appointment, he finding the cabin with all stores and paying his wages, the owners allowing whatever rate of wages they paid their own masters, and as the master was to be appointed by the charterer to superintend his interests, the owners were not to be responsible for such master's acts and conduct, should he deviate from the charter-party, but the charterer held himself responsible to the owners for the said master's honest and correct conduct and strict integrity whilst he should have the navigation of their vessel: Held, that under this charter-party, the possession of the vessel was given up by the owners to the charterer during the continuance of the contract; that the master (appointed by the charterer) was in possession of the cargo as agent for the charterer, and not as the servant of the owners; that personal credit was given to the charterer for the payment of the hire of the vessel; and that no lien upon the cargo was reserved to the owners as a security for the payment of the contract price for the hire of the ship. To a breach, alleging refusal by the defendants to deliver, or to permit the master to deliver, the cargo to the person to whom it was by the bills of lading made deliverable, or to the plaintiffs, the assignees of R. S., who had become bankrupt, the owners pleaded (rightly) that a large sum was due to them under the charter-party, to recover which they had brought an action against R. S.; that before the bankruptcy of R. S. it was agreed between him and the defendants that they should withdraw their action, and that he should deliver to one W. G. C. the bills of lading for the homeward cargo, and should empower W. G. C. to receive the proceeds thereof for the purpose of paying in the first place to the defendants any freight that might be due to them on the charter party and the balance of R. S.'s account with W. G. C., that the defendants withdrew their action, and that R. S. empowered W. G. C. accordingly; and that upon the arrival of the ship, the defendants in their own right, and as the agents of W. G. C., took possession of the cargo, &c. Replication, that, at the time of making the agreement, no part of the cargo was on board of the vessel, nor any of the bills of lading in existence, nor had they at any

time come into the possession of W. G. C., or of the defendants, or of R. S.; that before the shipping of the cargo, or the existence of the bills of lading, and before W. G. C. had any control over the cargo, and while R. S. was the apparent and reputed owner thereof, and whilst the defendant's action against him was still pending, R. S. became bankrupt, and the plaintiffs were appointed his assignees, whereby the authority given to W. G. C. or the agreement with the defendants became revoked, and that the cargo was, from the time of the shipping till the seizure thereof, in the possession and control of the plaintiffs as assignees, and one M'Cormick (a master appointed by R. S.) as their agent. Rejoinder; that before the bankruptcy of R. S., certain goods had been provided and *shipped* at Sierra Leone by R. S.'s agents, as part of the homeward cargo and on his account, and that these goods were carried to the river Gambia, where, for the purpose of more conveniently loading the whole of the homeward cargo, they were landed before R. S.'s bankruptcy, and there remained ready for shipment; that other goods provided by R. S.'s agents at the river Gambia were also before his bankruptcy ready for shipment on his account, as a further portion of the homeward cargo, and that afterwards both sets of goods were shipped accordingly; and thereupon the defendants, for the purposes and by the authority in the plea mentioned, took possession, &c.: Held, that that portion of the cargo which had been brought from Sierra Leone to the river Gambia were sufficiently alleged to have been in the possession of the charterer at the date of the agreement mentioned in the eighth plea, as part of the homeward cargo mentioned in that agreement, to bring it within the terms thereof, as equitably assigned to W. G. C. for the purpose therein mentioned; and *semble*, that if the rest of the goods had been with equal clearness described to have been in the possession of the charterer's agents, or before his bankruptcy set apart and definitely appropriated as part of the homeward cargo, the same result would have followed as to them. But held, that as by the pleadings it was admitted that the bankrupt was left in the sole possession and management of the cargo, and with full power to dispose of or gain credit upon any portion of it, having parted with no document that was essential to his power of disposal, it passed to the plaintiffs as goods in the order

and disposition of the bankrupt at the time of the bankruptcy, under 6 Geo. 4, c. 16, s. 72. *Belcher v. Capper*, 5 Scott, N. R. 257.

CORPORATION. (*Trespass maintainable against.*) Trespass, as well as trover, will lie against a corporation aggregate. *Maud v. The Monmouthshire Canal Company*, 5 Scott, N. R. 457.

DEED. (*Conveyance in, by reference to plan—Falsa demonstratio.*) A deed conveyed a piece of land, forming a part of a close, by reference to a schedule annexed. The schedule described the land, in a column headed "No. on the plan of the Briton Ferry Estate," as "153 b;" in a second column, headed "Description of premises," as "a small piece marked on the plan; in a third column, as being in the occupation of J. E.; and in a fourth, as "34 perches." At the time of the contract, a line was drawn upon the plan as the boundary line dividing the piece 153 b from the rest of the close of which it formed a part. The plan was drawn to a scale, but, upon measurement of the land, was found incorrect; and 153 b contained, within the line so drawn, less than 34 perches according to the actual measurement on the plan, and 27 perches only according to the actual measurement of the land: Held, that the statement, that the piece of land conveyed contained 34 perches, was merely falsa demonstratio, the prior portion of the description being sufficient to convey it, and that the deed passed only the portion of land actually marked off on the plan, as measured by the scale. *Llewellyn v. Earl of Jersey*, 11 M. & W. 183.

DETINUE. (*Lien, when a defence in.*) In detinue for a picture, it appeared that it had been intrusted by the plaintiff to one Bye for sale, that Bye deposited it with the defendant, an auctioneer, and that when the plaintiff demanded it (without tendering anything for warehouse rent) the defendant refused to deliver it up until a debt of 8*l.* due to him from Bye was discharged: Held, that the repudiation of the plaintiff's title precluded the defendant from afterwards setting up a lien on the picture for warehouse rent. *Dirks v. Richards*, 5 Scott, N. R. 534.

GOODS SOLD AND DELIVERED. (*For what chattels maintainable.*) Indebitatus assumpsit in the sum of 3000*l.* "for the price and value of a main engine and other goods sold and delivered." It was proved at the trial, that the contract was "to build an engine of 100 horse power for the sum of 2500*l.*, to be com-

pleted and fixed by the middle or end of December;" and it appeared that the different parts of the engine were constructed at the plaintiff's manufactory, and sent in parts at different intervals to the defendant's colliery, a distance of twenty miles, where they were fixed piecemeal, and so made into an engine: Held, that the price agreed upon was not recoverable in the above form of action. *Semble*, that the proper form of count was, either in *indebitatus assumpsit* for work, labour, and materials, or for erecting and constructing an engine. *Clark v. Bulmer*, 11 M. & W. 243.

HUSBAND AND WIFE. (*Pledge by wife of husband's goods.*)

In trover by the personal representatives of G., for a chest of plate which the defendants claimed to hold as security for an advance of money, an examination upon interrogatories of the widow of G. was given in evidence, to show that the plate was pledged by her with the assent of her late husband: Held, that such examination was inadmissible, as being contrary to the general policy of the law. *O'Connor v. Majoribanks*, 5 Scott, N. R. 395.

2. (*Marital right to money acquired by wife living apart.*) A husband and wife lived apart from each other; at the death of the wife she was possessed of money, which was assumed to be the accumulations of interest arising from stock settled to her separate use: Held, that the husband was entitled to this money in his marital right.

The money was taken possession of for her father, (who was one of the executors named in a will made by his wife under a power reserved to her by the settlement, but which will did not in terms pass the accumulations,) to whom it was handed over immediately: Held that, the original taking being wrongful, the defendant could not discharge himself by thus dealing with the money. *Tugman v. Hopkins*, 5 Scott, N. R. 464.

3. (*Scire facias to join husband in suit, when necessary.*) Where an action is brought by a feme sole, who marries after the commencement of the suit, but before the trial, it is not necessary to sue out a *scire facias*, to make the husband a party to the suit. (2 Saund. 72 i.) *Walker v. Golling*, 11 M. & W. 78; 2 D. P. C. (N. S.) 776.

4. (*Wife's authority to bind husband by admission.*) Where a

wife carried on in her husband's absence the business of a shop, and by his authority attended to all the receipts and payments: Held, in an action of replevin by the husband, that a statement made by the wife to the landlord, on the occasion of her paying him rent for another person, that she would pay the rent of the shop on a future day, and admitting its amount, was not evidence against the husband of the terms of the tenancy. (1 Bing. 99.) *Meredith v. Footner*, 11 M. & W. 202.

INFANT. (*Necessaries, what are.*) Dinners, confectionery, or fruit, supplied to an infant, an undergraduate in the university, having lodgings in the town, are not, *prima facie*, necessaries; and in an action brought against him for such articles, no special circumstances being shown, the court directed a nonsuit to be entered. *Brooker v. Scott*, 11 M. & W. 67.

2. (*Account stated by—Ratification after full age—Pleading—New assignment.*) An account stated by an infant is not absolutely void, but voidable only, and may be ratified by him after attaining his full age; and if he does so ratify it, an action of *debt* as well as *assumpsit* may be maintained thereon.

Quere, whether to a plea of infancy, the plaintiff ought to new assign the ratification as a new contract entered into after the party has obtained the capacity of contracting, or plead it by way of replication, as an act giving validity to an otherwise invalid contract. *Williams v. Moor*, 11 M. & W. 256.

INSURANCE. (*Life policy, construction of—Death of assured, by his own hands, what is.*) In the year 1828 a policy was effected by one W. B. upon his own life, with a proviso that, "in case the assured should die upon the seas (except in such passages as were allowed by the rules of the society,) or go beyond the limits of Europe, or enter into or engage in any naval or military service whatsoever, unless license should be obtained from a court of directors of the society, or should *die by his own hands*, or by hands of justice, or in consequence of a duel, &c. &c., the policy should be void." In 1838 the assured, being at the time of unsound mind, precipitated himself from Vauxhall Bridge into the Thames, and was drowned. In an action brought by his executor on the policy, the jury found that the assured "voluntarily threw himself into the river, knowing at the time that he should thereby destroy

his life, intending thereby to do so, but that at the time of committing the act he was not capable of judging between right and wrong:" Held (dissentiente Tindal, C. J.), that upon this finding the defendant was entitled to the verdict, the proviso embracing *all* cases of intentional self-destruction. *Borradaile v. Hunter*, 5 Scott, N. R. 418.

2. (*Interest.*) A person who assigns away his interest in a ship or goods, after effecting a policy of insurance upon them, and before the loss, cannot sue upon the policy; except as a trustee for the assignee, in a case where the policy is handed over to him upon the assignment, or there is an agreement that it shall be kept alive for his benefit. *Fowles v. Innes*, 11 M. & W. 10.

3. (*Misrepresentation and concealment by assured.*) The shipping list at Lloyd's, stating the time of a vessel's sailing, is *prima facie* evidence against an underwriter as to what it contains, as the underwriter must be presumed to have a knowledge of its contents, from having access to it in the course of his business: but where the insurer, in a letter written for the purpose of effecting the insurance, made a false statement and concealment as to the time of the vessel's sailing, and the underwriter, relying upon that representation, did not in fact look at the list, but acted upon the representation in making the insurance: Held, that the underwriter was not bound by the contents of the list, so as to render the misrepresentation and concealment by which he was misled immaterial, and that it was the duty of the judge to have pointed out to the jury that misrepresentation and concealment. *Mackintosh v. Marshall*, 11 M. & W. 116.

4. (*Insurance, "lost or not lost"—Interest—Pleading—Argumentative general issue.*) Declaration on a policy of insurance stated, that the plaintiff caused a policy to be effected, purporting thereby and containing therein, that B. and Co., as well in their own names as in that of all parties interested, made assurance with the defendants for 2000*l.* on goods (declared to be 360 bales of cotton), *lost or not lost*, at and from Bombay to London; and that in consideration thereof, and that the plaintiff paid the defendants the premium, and agreed to observe the terms and conditions of the policy, the defendants promised him that they would become assurers to the plaintiff of the said sum of 2000*l.* The declaration

then averred that the goods were shipped on the voyage; that the plaintiff was during the voyage, to wit, on &c., interested in the goods to the amount insured; that the assurance was made for the use and benefit and on the account of the plaintiff; that the ship sailed, and met with tempestuous weather, whereby the goods were wetted and damaged, and rendered of no use or value to the plaintiff: Held, that a plea to this declaration, that the goods were so damaged before the plaintiff acquired any interest therein, was bad on general demurrer.

A party may make an insurance on goods lost or not lost, though he have acquired his interest in them after a partial loss, unless he bought them with a knowledge of the damage.

A plea to the above declaration, that the policy was not caused to be made by or on behalf of the plaintiff, was held bad on special demurrer, as amounting to non assumpsit. So also was a plea, that the plaintiff did not pay the premium, nor promise the defendants to observe the terms and conditions of the policy.

A defendant is not at liberty to traverse any single material fact which would be included in the general issue.

The plea of non assumpsit puts in issue the consideration for the promise as well as the promise itself. *Sutherland v. Pratt*, 11 M. & W. 296; 2 D. P. C. (N. S.), 813.

LANDLORD AND TENANT. (*Covenant not to use land otherwise than as meadow or pasture, how broken—Rent, satisfaction of by distress.*) In a lease of land, the lessee, in addition to a certain reserved rent, covenanted to pay a penal rent for pasture land broken up or "used or converted to any other use than meadow or pasture land:" *Quare*, whether using the land as a racecourse and ground for training horses was a breach of the covenant, at all events the question is one for a jury, and not determinable by the court on demurrer.

To a breach alleging non-payment of the reserved rent, the defendant pleaded, "as to so much of the declaration as related to the sum of 150*l.*, parcel of the said alleged arrears of rent in the declaration firstly mentioned," that after the same became due, and before the commencement of the action, the plaintiff distrained certain goods and sold them for a sum greater than the amount of the arrears of rent, and thereby then satisfied and dis-

charged the said last mentioned arrears: Held no answer. *Aldridge v. Howard*, 5 Scott, N. R. 623.

2. (*Right of tenant to leave for nuisance to house.*) It is an implied condition in the letting of a house, that it shall be reasonably fit for habitation; if it be not (e. g. where it is greatly infested with bugs), the tenant may quit it without notice. *Smith v. Marrable*, 11 M. & W. 5; 2 D. P. C. (N. S.) 810.

LIBEL. (*Pleading to part of—Inducement, when properly traversed.*) Declaration for libel averred, that before and at the time of the committing of the grievance by the defendant, the defendant used the word "black-sheep" for the purpose of expressing and meaning, and it was understood by the persons to whom the libel was addressed as expressing and meaning a person notorious by reason of bad character, and of stained and sullied reputation: yet the defendant, intending to cause it to be believed that the plaintiff had conducted himself dishonestly and improperly, published of and concerning the plaintiff the libellous matter following: "Black-sheep" (meaning thereby that the plaintiff was a black-sheep, in the sense and meaning in which the word was so used by the defendant.) [The declaration then set forth a statement of facts respecting the plaintiff, no part of which was in itself libellous.] The defendant pleaded, as to the publishing of the following part of the supposed libel, that is to say, "black-sheep," that the defendant did not use that word for the purpose of expressing or meaning, nor was it understood by the persons in the declaration mentioned as expressing or meaning, a person notorious by reason of bad character, or of stained and sullied reputation: concluding to the country: Held, on special demurrer, 1st, that the plea was well pleaded to that part only of the libel: 2dly, that it was rightly pleaded as to the publishing of that part of the libel, and not to the inducement in the declaration as to that part: and, thirdly, that it was not bad as amounting to not guilty; the averment in the declaration, as to the word "black-sheep," being properly matter of *inducement*, which it was necessary to traverse specially. *M'Gregor v. Gregory*, 11 M. & W. 287; 2 D. P. C. (N. S.) 769.

LIMITATIONS, STATUTE OF. (*Payment of interest by co-contractor.*) N. having applied to D. for loan of 300*l.* on mort-

gage, D., doubting the sufficiency of the security, refused to advance it without having, in addition, a joint and several promissory note for 50*l.* from N. and one F., payable on demand. The note and mortgage were accordingly given, the latter containing a covenant by N. to pay the sum of 300*l.* and interest at five per cent. Several half-yearly payments of 7*l.* 10*s.* each for interest having been made by N.: Held, in an action against F. upon the note, that such payment by N. kept all the securities alive, and prevented the operation of the Statute of Limitations as to the note. *Dowling v. Ford*, 11 M. & W. 329.

MALICIOUS PROSECUTION. (*Probable cause.*) Case for a malicious prosecution. The plaintiff, having become tenant to the defendant, who resided in Wiltshire, of a house and lands in Carmarthenshire, together with the exclusive right of sporting over certain lands adjacent, belonging to the defendant, fished one of the ponds by cutting down the dam, and but few fish having been caught, one D., who was the defendant's local agent, suggested to the plaintiff that he might fish a certain pond on the estate by cutting down the bank and placing a net to catch the fish; which the plaintiff accordingly afterwards did during the tenancy, and a few fish were taken. Disputes having afterwards arisen between the plaintiff and the defendant, D. laid an information before magistrates against the plaintiff for unlawfully and maliciously breaking down the dam and destroying the fish, under 7 & 8 Geo. 4, c. 30, s. 15, and D. having been examined, the magistrates required the plaintiff to find bail to appear to an indictment for that offence at the next assizes, where a bill was preferred but ignored. The defendant was not present at the hearing of the information, nor was there any evidence to show that he knew that D. had given the plaintiff permission. At the trial, the judge asked the jury whether in their opinion D. had given permission, and they found that he had; they also found that D. acted under the defendant's authority in instituting the proceedings; and the learned judge having expressed his opinion that there was an absence of reasonable and probable cause: Held, that he was correct in so deciding, and that, independently of the permission given by D., there was no reasonable or probable cause for instituting the proceedings. *Michell v. Williams*, 11 M. & W. 205.

MASTER AND SERVANT. (*Discharge of servant for disobedience—Pleading.*) Where an agreement contained an attestation clause, and, subjoined to it, the name of a person as an attesting witness, but the name was written in pencil, and not by the supposed witness, but by one of the parties to the instrument: Held, that there was no *prima facie* evidence of there being an attesting witness, so as to render it necessary to call the supposed witness, and that the signatures of the parties might be proved by other evidence.

To an action against the defendants, proprietors of a cotton manufactory, for refusing to employ the plaintiff as manager pursuant to agreement, and discharging him from their service before the period mentioned in the agreement; the defendants pleaded, that the plaintiff so wrongfully, disobediently and unskilfully conducted himself as such manager, that they, the defendants, suffered and sustained great loss, to wit, to the amount of 1000*l.* &c.: Held, that, in order to support such a plea, it was necessary to show, not only disobedience, but such disobedience as occasioned a loss, and there being no evidence of any loss, that the plea was not supported.

Where there has been disobedience, or an act of misconduct by a servant, known to the master at the time he discharges him, although the master does not mention that as the precise ground of discharge, he may afterwards, by showing that the fact existed, and that he knew it, justify such discharge: but *semble*, that it is otherwise where the act of misconduct was not known to the master at the time of the discharge, as it could not then be the cause of it. *Cussons v. Skinner*, 11 M. & W. 161.

NUISANCE. (*Right to abate private nuisance—Request, when necessary.*) A party has no right to enter upon the land of another in order to abate a nuisance of filth without previous notice or request to the owner of the land to remove it, unless it appear that the latter was the original wrongdoer, by placing it there, or that it arises from a default in the performance of some duty or obligation cast upon him by law, or that the nuisance is immediately dangerous to life or health. (5 Rep. 100; Jenk. 6th cent., 57.) *Jones v. Williams*, 11 M. & W. 176.

PATENT. (*Novelty.*) The plaintiff took out a patent for the appli-

cation of anthracite or stone-coal combined with a hot-air blast in the smelting or manufacture of iron from iron-stone mine, or ore. The use of the hot-blast was already the subject of a former patent, granted to one Neilson, and was used by the plaintiff under a license from him; but the combination of the hot-blast with the use of anthracite in the smelting of iron was new, and the result appeared to be a larger yield at a smaller cost, and a better quality of iron, than under the former process by means of the combination of the hot-blast with coke from bituminous coal: Held, that this new combination was a "new manufacture within the meaning of statute of James. Neilson's stated that the blast was to be passed from the bellows or blowing apparatus into an air-vessel or receptacle" (not particularly describing its form,) and through or from that vessel or receptacle by means of a tube, pipe, or aperture, into fire, forge or furnace. The air-vessel used by the plaintiff consisted of a coil or succession of *tubes* so constructed as to expose to the action of the fire by which it was heated a larger surface of the air in its transit to the furnace, and thereby materially increase the temperature of the blast: Held that the hot-blast thus used by the plaintiff was substantially Neilson's hot-blast.

The degree of labour and expense of experiments does not properly enter into the consideration of whether or not an invention is the subject-matter of a patent. *Crane v. Price*, 5 Scott, N. R. 338.

PLEADING. (*Plea, when bad as argumentative traverse of plaintiff's possession, in trover.*) In trover against the sheriff for seizing certain goods and chattels of the plaintiff, the defendant pleaded that a writ of *fi. fa.* against the goods of one H. was delivered to him, a sheriff, to be executed; that the goods in the declaration mentioned were the goods of H.; that H. fraudulently and collusively gave and delivered to the plaintiff possession of the goods under colour of a feigned, covinous, and fraudulent alienation, bargain, and conveyance thereof from him to the plaintiff, then made, to the end, intent, and purpose to delay, hinder, and defraud the execution creditor and the other creditors of H. of their respective lawful actions, debts, and demands against H., contrary to the statute; and that the plaintiff claimed title to the goods under colour

of the said feigned, covinous, and fraudulent alienation, bargain, and conveyance thereof, &c.: Held, that the plea was bad, as a mere argumentative denial of the plaintiff's possession. *Howarth v. Tollemache*, 5 Scott, N. R. 329.

2. (*Replication of non est factum to plea of release.*) To a plea of a release by the plaintiffs of a co-contractor with the defendants, the plaintiffs replied non est factum, to which the defendants rejoined "that the said deed is the deed of the plaintiffs," on which issue was joined. *Seemle*, that this issue would be supported by the production of the release in a cancelled state, it having been cancelled by the releasee after the plea was pleaded, but before issue joined. *Todd v. Emlay*, 11 M. & W. 1.
3. (*Departure.*) To a declaration in assumpsit on several bills of exchange, for goods sold and delivered, &c., the defendant pleaded a release by deed, making profert. The replication set out the deed on oyer, from which it appeared that the plaintiffs and others, creditors of the defendant, agreed to release the defendant from their claims, on his agreeing to pay them a composition of 11s. in the pound thereon, and giving certain promissory notes for the amount; with a proviso that in case default should be made in payment of any of the notes when due, the agreement and release should be void. The replication then averred that default was made in payment of one of the notes, and that the same was renewed by another, which was dishonoured when due. Rejoinder, that before such default the defendant delivered to the plaintiffs another promissory note, which was accepted by them in lieu and satisfaction of the said first note: Held, that the rejoinder was bad, as being a departure from the plea. *Nevill v. Boyle*, 11 M. & W. 26; 2 D. P. C. (N. S.) 747.
4. (*Nul tiel record—Variance.*) In an action of debt on a judgment brought against L. B. and E. his wife, the declaration alleged that the plaintiff, on, &c. recovered judgment against the said E. by the name of E. R., in an action on promises, which promises were made by her the said E. whilst she was sole and unmarried. Plea, nul tiel record. On the judgment being produced in court, it appeared to have been recovered against E. R. and others: Held, this having been objected to on the ground of variance, that such objection was invalid; and that the objection, if any, should have

been taken by plea in abatement. *Cocks v. Brewer*, 11 M. & W. 51; 2 D. P. C. (N. S.) 759.

5. (*Plea of release, when set aside.*) An action having been brought against the defendant for illegally pledging certain quantities of tobacco, and the defendant having pleaded a release given to him by one of the parties interested in the tobacco, the court refused to set aside the plea, the releasor having an immediate interest in the money sought to be recovered, but no fraud being shown.

Quære, whether a court of equity would under such circumstances set the release aside?

A court of law has no jurisdiction to set aside a release which is good in law, but in the exercise of its equitable jurisdiction it may interfere to prevent a defendant from pleading a release, where it would be a manifest fraud on a third party seeking to enforce a demand against the defendant, and where the defendant himself is a party to the fraud. *Phillips v. Clagett*, 11 M. & W. 84.

6. (*Averment of lapse of reasonable time for performance of agreement, when necessary.*) Assumpsit: The declaration alleged that the plaintiff being possessed of a bill of exchange drawn by one S. E. upon and accepted by J. S., payable to S. E.'s order, for 400*l.*, and by him indorsed to G. E., who indorsed it in blank, and a fiat in bankruptcy having issued against S. E., by a certain agreement between the plaintiff and defendant, the defendant bought of the plaintiff, and the plaintiff bargained and sold to the defendant, the said bill of exchange for 200*l.*, and it was agreed between the plaintiff and defendant, that upon G. E. handing over to the plaintiff the sum of 200*l.*, the said bill should be delivered over to him. The declaration then alleged mutual promises, and the plaintiff's readiness to perform the agreement, and deliver the bill to the defendant or G. E., and averred that although the defendant did pay 50*l.*, parcel of the 200*l.*, yet he had not, although often requested, paid the residue thereof: Held, that the declaration was bad on general demurrer, for not averring that a reasonable time had elapsed since the making of the agreement. *Stavart v. Eastwood*, 11 M. & W. 197.

7. (*Averment of tous temps prius, when necessary.*) To a count for money had and received, the defendant pleaded that after the making of the promise, to wit, on, &c., the plaintiff requested him

to send the said sum of money to him by post, and that he did so. Held bad on special demurrer, for want of an averment, either that there was no prior request to pay, or that the defendant was always ready to pay. *Kington v. Kington*, 11 M. & W. 233; 2 D. P. C. (N. S.) 799.

8. (*Traverse, when sufficiently large—Judgment non obstante veredicto—Repleader.*) To a declaration by the payees against the acceptor of a promissory note, the defendant pleaded that one T. D., the brother of the defendant, then deceased, was in his lifetime indebted to the plaintiffs in a large sum of money, to wit, to the amount in the promissory note specified; and that after his death, and before interment, one of the plaintiffs, by a threat, that, unless the defendant would make and deliver the note, the plaintiffs would prevent the funeral of his brother from taking place, procured the making of the note from the defendant, who then made and delivered the same upon such threat, and for no other cause whatever. The plea also averred that there never was any consideration for the making of the note, and that the plaintiffs always held the same without value. Replication, that one of the plaintiffs did not by a threat, that, unless the defendant would make and deliver the note, the plaintiffs would prevent the funeral of the defendant's brother from taking place, procure from the defendant the note in manner and form alleged: Held, that the replication was a good answer to the whole plea.

Held, secondly, that where a replication traverses part of a plea, but leaves unanswered so much of it as forms a defence to the action, at the same time not expressly admitting it, the court cannot give judgment non obstante veredicto, or arrest the judgment, but the proper course is to award a repleader. *Atkinson v. Davies*, 11 M. & W. 236; 2 D. P. C. (N. S.) 778.

9. (*Implied colour—Denial of title by relation of assignees in bankruptcy.*) In trover by assignees of G. H. and W. L., bankrupts, against the sheriff, he pleaded, that one G. H. and one W. L. were traders, and indebted to divers persons in 200l., and that they became bankrupts; that afterwards, G. S. and W. S. sued out a fi. fa. against the said G. H. and W. L., which was delivered to the defendant, as sheriff, to be executed; and thereupon the defendant, after the bankruptcy, and before the fiat, seized and

took in execution the goods in the declaration mentioned, and before the fiat levied by sale thereof the moneys mentioned in the writ: that the said goods were, immediately before the bankruptcy, the property of G. H. and W. L., and liable to be taken and sold under the writ. The plea then stated the issuing of the fiat, the adjudication, and the appointment of the plaintiffs as assignees, whereby they became, as such, entitled to the possession of the said goods as from the time when the said G. H. and W. L. became bankrupts, *which possession is the said possession of the plaintiffs as assignees in the declaration mentioned.* It then averred that the fi. fa. was bonâ fide executed and levied, without notice of a prior act of bankruptcy, that the judgment was not founded on a warrant of attorney or cognovit, and that the seizure under the writ was the conversion in the declaration mentioned: Held, on special demurrer, that the plea was not bad as amounting to an argumentative plea of not possessed, inasmuch as it gave an implied colour, by admitting the right of the assignees, by relation, to the lawful possession of the goods at the time of the seizure under the fi. fa.

Held, also, that it sufficiently appeared from the whole plea, that the persons mentioned therein as having become bankrupts were the same persons as those mentioned in the declaration.

Held, also, that it was not necessary to aver that the execution was subsequent to the stat. 2 & 3 Vict. c. 29. *Unwin v. St. Quintin*, 11 M. & W. 277; 2 D. P. C. (N. S.) 790.

10. (*Plea, when bad as amounting to general issue.*) Where a plea qualifies the contract stated in the declaration, and introduces a new stipulation into it, it is bad as amounting to the general issue, although in truth it only sets out what was the *actual* agreement between the parties. *Nash v. Breeze*, 11 M. & W. 352.
11. (*Replication of prior demand, to plea of tender of part.*) A declaration in assumpsit alleged, that the defendant was indebted to the plaintiff in 100*l.* for work and labour, and in 100*l.* on an account stated. The defendant pleaded, as to 10*l.*, parcel, &c., a tender of that sum. Replication, that a larger sum than 10*l.*, to wit, 31*l.*, being part of the moneys in the declaration mentioned, including the said sum of 10*l.*, was due on account of one and the same cause of action in the declaration mentioned, and that, before

the tender, the plaintiff demanded the said sum of 31*l.*, which the defendant refused to pay: Held, on special demurrer, that the replication was insufficient, as it did not show that the 31*l.* was due on one entire contract.

Seemle, that where a sum is due on one entire contract, as on a bill of exchange or promissory note, and the defendant pleads a tender of a smaller sum, the plaintiff may reply that he demanded the larger sum, and that the defendant refused to pay it. (9 M. & W. 338; 7 M. & W. 147; 1 Camp. 181; 5 B. & Ald. 630.) *Hesketh v. Fawcett*, 11 M. & W. 356; 2 D. P. C. (N. S.) 827.

12. (*Replication to plea of set-off, when payment may be proved under.*) Under a replication to a plea of set-off, "that the plaintiff was not at the commencement of the suit, nor is indebted to the defendant, in manner and form," &c., the plaintiff may give evidence of payment. But not under a replication of *nunquam indebtedus* merely. (8 D. P. C. 622; 4 D. P. C. 585.) *Harvey v. Hoffman*, 2 D. P. C. (N. S.) 683.

13. (*Plea of nul tiel record, to declaration in scire facias, what it puts in issue.*) A plea of nul tiel record, to a declaration in scire facias on a judgment more than a year and a day old, puts in issue only the recovery of the judgment. Therefore, where, on a motion for judgment upon such a plea, it appeared that the venue in the proceedings in scire facias was in Kent, but in the original action in London, it was held that the variance was immaterial. *Phillips v. Smith*, 2 D. P. C. (N. S.) 688.

14. (*Duplicity—Plea of successive bankruptcies of plaintiff.*) To a declaration on four bills of exchange drawn by the plaintiff and accepted by the defendant: Plea, that before the accruing of the cause of action, on the 30th of October, 1809, a commission of bankruptcy had issued against the plaintiff, that proceedings had been had thereon, that the plaintiff obtained his certificate on the 5th of December, 1810, but that his estate had not paid 15*s.* in the pound; that on the 31st of October, 1817, the plaintiff had petitioned the insolvent court, and that on the 17th of December in the same year he had been adjudged to be entitled to the benefit of the insolvent act, but that his estate had not paid 15*s.* in the pound: that on the 10th of November, 1821, a commission of bankruptcy had issued against the plaintiff, that he obtained his

certificate of conformity on the 26th of March, 1822, but that his estate had not produced 15*s.* in the pound; that on the 23d of February, 1824, a commission of bankruptcy had issued against the plaintiff, under which he obtained his certificate on the 19th of April, 1824, and that his estate had not produced 15*s.* in the pound; that on the 19th of December, 1836, a fiat in bankruptcy had issued against the plaintiff, and that he finished his examination on the 20th of April, 1837, but that his estate had not produced 15*s.* in the pound; and on the 26th of July, 1837, the plaintiff petitioned the insolvent court, and was declared to be entitled to the benefit of the act on the 6th of November, 1837, and that his estate did not produce 15*s.* in the pound: Held, upon demurrer, that the plea was double, and therefore bad; and the court refused to allow the defendant leave to plead several pleas, but gave leave to amend, on payment of costs. *Alexander v. Townley*, 2 D. P. C. (N. S.) 886.

PRESCRIPTION. (*What may be prescribed for—Coal mine.*)

The right to a given substratum of coal lying under a certain close is a right to land, and cannot be claimed by prescription.

Aliter, of a right to take coal in another man's land. *Wilkinson v. Proud*, 11 M. & W. 33.

PRINCIPAL AND SURETY. (*Fraud upon surety, evidence of*

—Witness, competency of.) To debt on the joint and several bond of H. and one I. C., conditioned for payment to the plaintiff and one B. of 300*l.* and interest, the defendants (the executors of H.) pleaded that the said supposed writing obligatory was obtained from H. in his lifetime, and he was induced to execute and enter into the same by the plaintiff (the surviving obligee), and B. and another in collusion with them, by and by means of the fraud, covin, and misrepresentation of the plaintiff and B., and the said others in collusion with them. At the trial it appeared that the bond declared on, and also a separate bond on I. C. for the further sum of 125*l.*, had been given by I. C. as the consideration for a medical practice. To support the pleas the defendants called I. C., who stated that he negotiated with one R. (the attorney for the executors of B.) for the purchase of the practice; that the sum demanded was 425*l.*, to be paid at a future period, with security; that he told R. that he had consulted his friend H., who thought

300*l.* enough, and would join him in a bond for that sum, but no more; that R. then proposed to him to get H. to join in a bond for 300*l.*, and to execute a separate bond for 125*l.*, he (the witness) said, that if H. knew he had done so, he would have nothing to do with the matter, whereupon R. observed that there was no necessity for H. to know anything about it, and that H. was not at that time made acquainted with the real transaction. On the other hand R., who was called as a witness for the plaintiff, denied that there had been any agreement between himself and I. C. to conceal from H. the real nature of the transaction, or that he had any knowledge that there had in fact been any concealment; he admitted that he did not ask I. C. if H. the surety knew that he (I. C.) was to give his separate bond for the additional 125*l.*, but he positively swore that he did tell I. C. that there was no necessity for letting H. know it.

In summing up the case to the jury, the judge told them that it would not be enough to release the surety (H.) that there had been fraud or misrepresentation on the part of the principal debtor; but that, in order to make out the plea, the defendants were bound to satisfy them that the plaintiff or R. (the attorney) were parties to a fraud upon H., that it was agreed between R. and I. C. that a further security than that which H. was aware of or willing to become a party to, but that fact should be concealed from H.; that if they thought that H. was induced to execute the bond under the belief that the purchase money was 300*l.* only, when in fact a larger sum unknown to him was stipulated for, that would be sufficient to support the plea. And finally, he left the question to them upon the credit of the two witnesses, and in the terms of the issue: Held, that this direction was substantially correct; and the jury having returned a verdict for the plaintiff, the court declined to interfere.

The circumstance of the liability of a witness to a future action, in the event of a verdict one way being barred by the statute of limitations, is an answer to an objection to his competency on the ground of interest. *Spencer v. Handley*, 5 Scott, N. R. 546. **RELEASE.** (*By composition deed.*) The plaintiff A., the purser of a mine, in order to carry it on, raised money by the deposit of a promissory note, made in his favour by seven of the shareholders,

and which two other shareholders had refused to sign, and applied the money so raised in paying the workmen. At a subsequent meeting of the shareholders and creditors, an assignment of the mine, in order to sell it, and pay the debts, was resolved upon, and A. then claimed to be admitted as a creditor, "for money which he had raised on note of hand to pay the workmen." A deed of assignment was accordingly executed, to which all the adventurers were parties of the first part, and the several persons whose names were thereunto subscribed, "as creditors of the several other persons thereinbefore described of the first part as adventurers, for supplies to and debts incurred by them for or in respect of the same mine, to the amounts set opposite their respective names," of the second part. This deed, after reciting that the shareholders had in the prosecution of the mine incurred debts thereon with the persons parties thereto of the second part, contained a conveyance in trust for those creditors, and a provision that no action should be brought by any of the parties thereto of the second part, against all, any, or either of the persons parties thereto of the first part, for the recovery of any debts due or owing upon the said mine, or in anywise relative thereto; and that if any such action was brought, the deed might be pleaded as a release. A. executed the deed, the amount of the note and interest thereon being placed against his name. To an action brought by A. upon the note against the seven persons who signed it, they pleaded the deed as a release, averring that A. signed it as a creditor of the parties thereto of the first part, in respect of the causes of action in the declaration mentioned, which allegation was traversed by the replication. Held, that A. must be held to have signed the deed in respect of his claim for the advance of the money raised upon the note, and applied for the use of the mine, and not in respect of his claim upon the note itself, which therefore was not released, and that consequently the plea was not proved. *Lanyon v. Davey*, 11 M. & W. 218.

SHERIFF. (*Liability of, under 8 Ann. c. 14—Pleadings.*) A sheriff who seizes goods under a fieri facias, and, after notice that rent is due to the landlord of the defendant, removes the goods without such rent having been first paid, is liable for such removal, on the stat. 8 Ann. c. 14, s. 1, to an action on the case at the suit of the landlord.

— In such action, no averment of notice to the *execution creditor* is necessary.

Nor need it be alleged that the goods removed were goods chargeable by law with a distress.

In order to maintain the action, it must appear that the premises were held at a rent certain. And where the tenant entered into possession in January, 1829, under an agreement made in October, 1828, whereby a lease was to be granted to him from the 20th November, 1828, but no lease was granted; and the tenant continued to occupy until the time of the execution, in February, 1842, but no payment of rent was shown to have been made: Held, that it did not sufficiently appear that he held as tenant at a rent certain, so as to bring the case within the statute, and render the sheriff liable.

Quære whether any action lies for the landlord against the *execution creditor*. *Ris'ly v. Ryle*, 11 M. & W. 16.

2. (*When protected by outstanding writs for non-execution of f. fa. — Evidence.*) Where goods seized under a writ founded upon a judgment fraudulent against creditors, remain in the hands of the sheriff, or are capable of being seized by him, he is compellable, under the statute 13 Eliz. c. 5, to seize and sell such goods under a writ afterwards received by him, and founded on a bona fide debt: and if he neglect to do so, having notice of the fraud, and return nulla bona to the latter writ, he is liable to an action for a false return.

Therefore evidence of the fraud in the previous judgment and execution is admissible in such action, in answer to a defence founded on the outstanding writ.

And the conduct of the debtor in reference to the execution of the previous judgment is admissible in evidence as a part of the fraud. (Peake, 65; 5 B. & Cr. 660; 8 B. & Cr. 132; 2 Dowl. 574.) *Imray v. Magnay*, 11 M. & W. 267.

- SHIP. (*Authority of master to borrow money.*) In a home as well as in a foreign port, the master of a ship has an implied authority to borrow money for the necessary use of the ship, if the owner be absent, and no communication can be had with him without great prejudice and delay. (6 M. & W. 138.)

But where the ship was in the port of Swansea, and the owner

at Llanelly, eleven miles off, and the master, wanting money to clear the vessel, and having been unable to raise it as the owner had directed, by selling part of the cargo, sent several messages to the owner for money, but, receiving none, borrowed 10*l.* of the plaintiff, telling him of those applications to the owner: Held, that this borrowing was not authorized, and that the plaintiff could not recover it from the owner; though the jury found that it was advanced for the necessary use of the ship, and on the credit of the owner, not of the master. *Johns v. Simons*, 2 Q. B. 425. See also *Stonehouse v. Gent*, id. 431, n.

TENDER. (*Right of inspection of goods by purchaser.*) An allegation of a tender of goods is not supported by proof of a delivery or offer to deliver closed casks, said to contain them; but they should be tendered in such a way that the party may have a reasonable opportunity of inspecting them, and of ascertaining whether what he has bargained for is presented for his acceptance. (10 M. & W. 757.) *Isherwood v. Whitmore*, 11 M. & W. 347.

USURY. A party having applied to the defendant for the loan of a sum of 6700*l.* for twelve months, on the security of a mortgage of freehold property, the defendant refused to advance the money unless the borrower would give him a promissory note for the amount, to be discounted by him at 5*l.* per cent. This the borrower agreed to, and a bond and mortgage were given for 6700*l.*; and the sum of 6365*l.*, the amount of the note minus the discount and charge of preparing the securities, was paid to the borrower. An ejectment having been brought to recover possession of the premises, on the ground that the mortgage was invalid as being given for an usurious consideration, the jury found that the primary object of the transaction was the discounting of the note, the mortgage being only a collateral security in the event of the note not being paid: Held, that the transaction was not usurious, and that the mortgage was valid independently of the recent statutes 7 Will. 4 & 1 Vict. c. 80, and 2 & 3 Vict. c. 27. *Doe d. Haughton v. King*, 11 M. & W. 333.

VENDOR AND PURCHASER. (*Of leaseholds—Vendor's liability to make out a good title.*) In every contract for the sale of leaseholds, there is, in the absence of an express stipulation to the contrary, an implied undertaking on the vendor's part to make

out the lessor's title to demise. Where in declaring on such contract, the undertaking is alleged as an *express*, instead of an implied one, the variance is cured by an indorsement on the record under 3 & 4 Will. 4, c. 42, s. 24. The purchaser's solicitor wrote to the vendor's solicitors, that unless certain proof of title were adduced, the purchase must go off: Held, that this did not preclude the purchaser from maintaining an action for the expenses he had been put to in investigating the title. *Hall v. Betty*, 5 Scott, N. R. 508.

EQUITY.

[Selections from 5 Mylne & Craig, Part 1; 4 Beavan, Part 3; 2 Younge and Collyer, Part 2.]

ADMINISTRATION OF ASSETS. (*Admission of assets by acts.*) Held, that a part payment of one legacy, and a proposal to the legatee to invest the whole of the remainder in a particular way, which was not done, amounted to a general admission of assets. *Barnard v. Pumfrett*, 5 M. & C. 63.

2. (*Costs of useless suit.*) A simple contract creditor, who had instituted and prosecuted a suit for administration, in the face of information furnished by the legal personal representative (which turned out to be correct), that there were no assets for the payment of simple contract debts, was ordered to pay the costs of the suit. *King v. Bryant*, 4 B. 460.
3. (*Expenses of funeral.*) 100*l.* only was allowed out of 145*l.*, expended by executors for funeral expenses, on an estate of about 12,000*l.* *Bridge v. Brown*, 2 Y. & C. 181.
4. (*Injunction—Costs.*) Injunction to restrain a creditor from proceeding at law granted without giving costs to the latter, the executor swearing to his belief that the creditor knew from the advertisement before the writ issued that a decree had been made, which the creditor did not deny. *Jones v. Brain*, 2 Y. & C. 170.
5. (*Maintenance allowed out of capital.*) Maintenance to some extent allowed out of capital, though the direction in the will applied only to income, the whole estate amounting to about 12,000*l.*, but the income having proved insufficient, owing to temporary charges; but sums expended in luxuries, as for the purchase of ponies, were disallowed. *Bridge v. Brown*, 2 Y. & C. 181.

6. (*Marshalling.*) See decree in *Symons v. James*, 2 Y. & C. 301.

7. (*Parties—Colonial will.*) Where testator lived in New South Wales, and his will was proved there, and his executor remitted money to a person in England, to be distributed among the legatees
• here, the court determined the rights of the legatees in a suit against the holder of the money without having before it any representative of the testator. *Arthur v. Hughes*, 4 B. 506.

ANNUITY. (*Where charged on corpus.*) Held, that an annuity directed to be paid out of the rents and profits of an estate to the testator's wife during the term of her life, was a charge upon the corpus, though the estate was directed to be conveyed over "from and immediately after the death of the wife." *Foster v. Smith*, 2 Y. & C. 193.

APPORTIONMENT. (*Time at which act applies.*) A life estate in realty was created by a deed in 1787. The estate was sold, and invested in 1821 in consols. The tenant for life died on the 9th of *December*, 1841: Held, that her executors were not entitled to an apportionment of the dividends under the 4 & 5 Will. 4, c. 22. *Michell v. Michell*, 4 B. 549.

2. (*Tithes—Executor of parson—Adoption of contract.*) A rector, who took a composition for his tithes every Michaelmas, died in January, 1841. The new rector was collated in the following April, and before harvest time he employed a surveyor to value the tithes. The surveyor furnished him with a report, stating what he considered ought yearly to be paid by each of the occupiers, as a composition in lieu of tithes. In August, the new rector required the respective occupiers to pay him, as a compensation for their tithes, the amount mentioned by the surveyor. The occupiers accordingly, in November, 1841, made their payments according to the surveyor's report, for the whole year, from Michaelmas, 1840, to Michaelmas, 1841: Held, that the representative of the late rector was entitled to be paid by the new rector a proportion according to the time which elapsed from Michaelmas, 1840, to the late rector's death, of the composition which existed in the late rector's lifetime.

Seemle, that a composition for tithes is within the statutes 11 Geo. 2, c. 19, s. 15, and 4 Will. 4, c. 22. *Oldham v. Hubbard*, 2 Y. & C. 209.

BOND. (*Construction—Evidence.*) Bonds and mortgages given by a son to his father for specified sums, held, under the circumstances, there having been no payment of interest on the securities, and the son having been maintained by the father up to the death of the latter, to be a security only for a running balance, of which the amount, there being no other evidence, was taken from the son's admission. *Melland v. Gray*, 2 Y. & C. 199.

CHARITY. (*Alienation—Long lease.*) Trustees of a charity have power, on a proper occasion, to alienate the property of the charity; and a lease for 999 years, at a clear rent of 45*l.*, of small houses in the city, which before were let to yearly tenants at an aggregate rent of 77*l.* was upheld as beneficial to the charity. *Attorney-General v. The South Sea Company*, 4 B. 453.

2. (*Breach of trust—Discretion of court.*) Where the master of an ancient hospital had, according to the custom of his predecessors, received and applied to his own use large fines on the renewal of leases, but threw no difficulty in the way of the information; the court, adverting to the discretion it possesses in dealing with such breaches of trust, after suggesting that the defendant should refund to the charity the difference between the reserved rent and the rack rent, the sum which would have been so due appearing to be excessive, allowed the matter to be referred to the attorney-general. *The Attorney-General v. Pretymen*, 4 B. 460.

3. (*Marshalling—Exoneration.*) A testatrix bequeathed legacies to charities and to individuals, and she directed her charity legacies to be paid "out of her ready money, and the proceeds of the sale of her funded property, personal chattels and effects, and not from the proceeds or by sale of her leasehold or real estates;" and she charged her leasehold estates, in addition, with the payment of her debts, funeral and testamentary expenses, and legacies not given to charities. The pure personalty was insufficient to pay the debts, &c. and all the legacies: Held, that the charity legacies failed in the proportion of the mixed personalty to the pure personalty. *The Philanthropic Society v. Kemp*, 4 B. 581.

CONDITION. (*Payment of money—Time of performance.*) Where a legacy was given to A. in the event of B. dying unmarried, but upon the express condition that A. should, within three years of testator's death, pay to the executors all moneys due

from him to the testator, the court observing that the legacy might have become payable before the end of the three years, by the death of B. within that period, and that this was a condition for the payment of money: Held, that the legacy was not lost by default of payment within the three years. *Paine v. Hyde*, 4 B. 468.

2. (*Performance—Personal appearance.*) Held, that a condition requiring that all persons who might be interested under a devise to a class, "should, within seven years after the death of the testatrix, personally appear before her executors and deliver to them a testimonial of their identity," in default of which the estate was given over, was sufficiently performed by an appearance to one of the executors and the agent of the other.

Quære, whether it was a condition subsequent? *Tanner v. Tebbutt*, 2 Y. & C. 225.

CONSIGNMENT. (*Change of destination.*) A consignor who has purchased goods on account and at the risk of his correspondent, and delivered them to the carrier, has no right, by reason of a variation of the accounts between him and his correspondent, or of a disagreement between them, to depart from his duty and deliver them to another person; and a party taking from the consignor with notice of the circumstances, is subject to the rights of the correspondent. *Green v. Maitland*, 4 B. 524.

EQUITABLE MORTGAGE. (*Evidence, written and verbal.*)

Parol evidence admitted in conjunction with written documents, to explain the extent of an equitable mortgage. *Ede v. Knowles*, 2 Y. & C. 172.

EVIDENCE. (*Entries by professional persons.*) The admissibility of such entries, whether for or against the interest of the party making them, considered, and the cases relating to the point noticed, particularly the case of *Clark v. Wilmot*, 1 Y. & C. 53, L. M. No. 56, in which the court corrected an error in the marginal note, observing, that the reason for admitting the entries as evidence in that case was, that upon the whole they were against the interest of the party making them. *Pickering v. The Bishop of Ely*, 2 Y. & C. 249.

2. (*Witness—Indirect interest.*) A person who had guaranteed the payment of a debt secured by a second mortgage was tendered,

in a suit relating to the first mortgage only, as a witness *vidæ voce* before the master, to prove that by certain dealings and transactions between the mortgagor and the first mortgagees, but to which he had happened to be a party, the first mortgage had been in part satisfied; and he stated on the *voir dire* that he had ascertained that the mortgaged property was sufficient to pay both the first and second mortgages: Held, that his evidence was admissible. *Wormald v. Mackintosh*, 5 M. & C. 5.

FAMILY ARRANGEMENT. (*Variation of settlement—Jurisdiction.*) Residuary personal estate was given by a will to such of the children of P. as should be living at his death, in equal shares. At the death of the testator there were five children of P., and no more, four of whom being adults entered into an agreement to the effect that, as amongst themselves, their respective shares, and any share that might accrue to them by the death of their infant sister, should be considered vested in them immediately, notwithstanding P. was living. After this, two of the children settled their respective interests in favour of their issue, who were minors. Upon the remaining child coming of age she was desirous to join in the arrangement, which the master found would be beneficial to all parties. The court however declined, on the ground of want of jurisdiction, to make a decree for carrying the arrangement into execution. *Peto v. Gardner*, 2 Y. & C. 312.

FRAUD. (*Sale of reversion—Assignment.*) A., a person of a reckless and improvident character, sold a reversion to B., at a gross undervalue, though it appears he was not ignorant at the time of the real value, but the circumstances were such on the whole as to make the transaction void. C., ten years afterwards, being at the time aware of the circumstances of the original sale, purchases the property from B. at a full value, A. joining in and confirming the sale. But, it appearing that C. had not taken any care to see that A.'s concurrence was obtained by a proper means, but left it to be obtained, as it was in fact obtained, without proper consideration, through B., the author of the original fraud; the decree was, that C.'s representative should hold the property only as a security for the money paid by B. on the original transaction. *Addis v. Campbell*, 4 B. 401.

HUSBAND AND WIFE. (*Wife's equity—Legal limitation.*)

Held, that the wife's equity for a settlement attached, as against the assignees of her insolvent husband, to the rents and profits of an estate of which she was legal tenant for life, subject to a term of 500 years for raising portions, which was vested in mortgagees. *Sturgis v. Champneys*, 5 M. & C. 97.

INJUNCTION. . (*Answer—Affidavit.*) Affidavits were filed in support of an application for an injunction, to restrain the master and part-owner of a ship from taking possession of goods claimed by him as his private property, and by the other partners as partnership property; after which the defendant put in his answer, and several affidavits were subsequently filed on both sides: Held, under such circumstances and on such an application, that the answer would only be treated as an affidavit. *Gardner v. M'Cutchcon*, 4 B. 534.

2. (*Bishop's receiver—Patent—Agreement.*) By a grant or patent, dated in 1801, the then bishop of Ely having, as the grant stated, "confidence in the probity, fidelity, care, and industry of P.," granted to P., who was a solicitor, "the office of receiver of all issues, profits, sum and sums of money, arising and issuing" from the possessions of the see, to hold to P. by himself or his sufficient deputy or deputies, to be approved of by the bishop and his successors, for his life. The office of receiver was an ancient office, and had been exercised before the restraining statute of 1 Eliz. c. 19. P. held the office under three successive bishops, during the whole of which time he not only received the rents, but negotiated the renewal of leases, and prepared the leases of the see, and likewise attended all searches for records in the bishop's muniment room, of which he kept a key, for the performance of which acts he received fees and emoluments. It appeared also that his predecessor in office, who had held the office since 1785, had done the same. Upon the accession of A. to the bishopric in 1836, he refused to admit P.'s claim of right to perform these last-mentioned acts; upon which P. filed his bill against the bishop, praying a declaration of the rights in question in his favour, that he might be quieted in the possession of the office, and that the bishop might be restrained by injunction from obstructing the plaintiff in the exercise of such rights, and from doing acts in contravention of them. Held, first, that the plaintiff's claim was not of such a

nature as to induce this court to interfere to protect them, without being well satisfied (which the court was not) that his legal remedy was insufficient to do him complete justice; and, secondly, that the relief sought being analogous to the specific performance of an agreement, the bill must fail on the ground of want of mutuality; the nature of the duties and services asserted by the plaintiff being such as to preclude the possibility of a decree in this court against him, compelling their specific performance.

Discussion of the rules of evidence relating to declarations in writing by deceased persons made in the ordinary course of business. *Pickering v. The Bishop of Ely*, 2 Y. & C. 249.

LOST DOCUMENT. (*Evidence of loss.*) A bill by indorsee against acceptor for payment, upon an indemnity of a bill of exchange, which the plaintiff by his bill alleged to be lost, but did not give any evidence of the loss beyond his own affidavit, dismissed with costs, as not making a sufficient case for an inquiry by the master, but without prejudice to another bill. *Cockell v. Bridgeman*, 4 B. 499. (Affirmed on appeal.)

MORTGAGE. (*Advances to first mortgage, after notice to second.*)

Quere, how far a person having a mortgage for a running account is entitled to charge against a second mortgagee advances made subsequent to notice of his mortgage. *Johnson v. Bourne*, 2 Y. & C. 268.

2. (*Extent of security.*) A. mortgaged an estate to a banking company with which he dealt, for the purpose of securing the balance that might at any time be due from him, so as the whole amount of principal to be ultimately recovered by virtue of the security should not exceed 5800*l*. Afterwards three portions of the estate were sold with the concurrence of the banking company, and the money paid directly to them, but credit was given to A. for them in his account: Held, that the moneys recoverable under the mortgage were reduced by these payments, as far as they went. *S. C.*

PARTNERSHIP. (*Injunction—Dissolution.*) What degree of negligence or misconduct in a partner will entitle his co-partner to a dissolution, and therefore also to an injunction and receiver? *Smith v. Jeyes*, 4 B. 503.

PLEADING. (*Bill for account.*) It is not necessary for a plaintiff, in a bill for an account, to submit to account himself; a demur-

rer on the ground of the omission of such a submission was therefore overruled. *Clarke v. Tipping*, 4 B. 588.

PORTION. (*Satisfaction pro tanto—Loco parentis.*) Held, upon a full consideration of the authorities, that a lesser portion given on marriage was a satisfaction *pro tanto* only of a legacy in a prior will.

A grandfather was held, under the circumstances, to have placed himself in loco parentis, though he did not wholly provide for the maintenance of the grandchildren, and though the father was alive, and they resided with him. *Pym v. Lockyer*, 5 M. & C. 29.

2. (*When raisable—Costs.*) Where by a settlement portions were to be raised at any time after the death of the father by the trustees of a term, to commence after the death of the father and mother, the portions to be paid at twenty-one or marriage of daughters, which should first happen, after the death of the father: Held, that the portions were raisable during the lifetime of the mother, who was the survivor, and that the cost of raising them fell on the estate. *Mickell v. Mickell*, 4 B. 549.

POWER. (*Trust implied from power.*) A testator directed that certain stock should stand in his name, and certain real estates remain unalienated, "until the following contingencies are completed;" and after giving life interests in such stock and estates to his two children, with remainder to their issue, he declared that in case his two children should both die without leaving lawful issue, the same should be disposed of as after mentioned, that was to say, the survivor of his two children should have power to dispose by will of his real and personal estate, "amongst my nephews and nieces, or their children, either all to one of them or to as many of them as my surviving child shall think proper:" Held, that a trust was created in favour of the testator's nephews and nieces and their children, subject to a power of selection and distribution in his surviving child. *Burrough v. Philcox*, 5 M. & C. 73.

PRODUCTION OF DOCUMENTS. (*Concurrent suits.*) A defendant had been ordered by the vice-chancellor in another suit to give inspection of documents. The order had been made two years, but had not been acted on: Held, that this did not prevent an order for production in the present suit. *Bourne v. Mole*, 4 B. 417.

2. (*Costs of affidavits.*) The costs of affidavits, used to qualify the answer of a defendant, so as to excuse him from the production of documents, must be paid for by the defendant. *Smith v. Massie*, 4 B. 417.
3. (*Sufficiency of description.*) A defendant by his answer admitted that he had in his possession "divers books of account:" Held, that the particulars were not sufficiently specified to enable the court to make an order for their production. *Inman v. Whitley*, 4 B. 548.
4. (*Surviving executor.*) Surviving executor, who had not acted in the testator's affairs, protected from the discovery of cases and opinions stated and given on behalf of the deceased executor, who had acted; such cases and opinions having relation to a claim against the deceased executor of the same nature as the claim made against the surviving executor. *Adams v. Barry*, 2 Y. & C. 167.

SALE UNDER DECREE. (*Lien—Nonconcurrence of creditor.*)

A. having a lien on the testator's estate, established his debt under the decree; but his claim for interest was disallowed by the master, whose report stood confirmed. The estate was sold, subject to A.'s lien, and A. having refused to accept from the purchaser his principal without interest, was not allowed to participate as a creditor in the general assets. *Hempstead v. Hempstead*, 4 B. 423.

SHIP. (*Private trading by master.*) The master and part owner of a ship purchased goods during the voyage, which his answer stated were purchased out of private property and the profits of private trade during the voyage; but the court considering there were strong grounds for thinking that the goods were purchased with partnership property, or with money for which the defendant was accountable to the partnership, and that they belonged to the partnership, restrained him from receiving the goods. *Gardner v. M'Cutcheon*, 4 B. 534.

SOLICITOR. (*Authority to institute suit.*) A suit instituted by solicitor without any authority, dismissed on motion of the plaintiff with costs of the suit and motion as between solicitor and client. *Allen v. Bone*, 4 B. 493.

TENANT FOR LIFE. (*Renewal of leaseholds.*) The rule, that a tenant for life or leaseholds renewing or extending the term does

so for the benefit of the trust, held to apply, although it was by the settlement provided only that one specified renewal should, if made, enure to the trust. *Tanner v. Elworthy*, 4 B. 487.

TRUSTEE. (*Breach of trust—Executors—Payment into court.*)

Executors held liable for the loss of an ascertained balance which they had allowed their co-executor to retain in his hands, and ordered to pay into court the amount of the residue returned by them and their co-executor to the stamp-office, without prejudice to their right to have the account taken. *Lincoln v. Wright*, 4 B. 427.

2. (*Cost—Assignee of trust property.*) Trustees held entitled to costs as trustees in a suit successfully brought against them by the assignee from a cestui que trust to have a term assigned to him. (See this case, 3 B. 434, L. M. No. 59.) *Holford v. Phipps*, 4 B. 475.

3. (*Trustee Act—Form of petition.*) A petition under the 1 W. 4, c. 60, to obtain a transfer of trust stock from the names of the surviving trustees into the joint names of such trustees and of a new trustee duly appointed, is properly presented by such new trustee. *In re Law*, 4 B. 509.

VENDOR AND PURCHASER. (*Costs of invalid objection—*

Special conditions of sale.) In a suit for specific performance, a purchaser who set up a defence which prevented the plaintiff obtaining on motion a reference as to title, and failed in establishing it, was ordered to pay the costs up to and inclusive of the hearing. Observations on special conditions of sale. *Hyde v. Dallaway*, 4 B. 606.

VOLUNTARY SETTLEMENT. (*Completeness.*) A person,

who was entitled to a certain stock standing in the names of two trustees, gave instructions to his attorney to prepare a settlement of it for the benefit of A., B., and C., and to procure from the trustees a transfer for the purposes of settlement. The settlement was prepared, and a power of attorney for the transfer of the stock executed by both the trustees, but the intended settler died without having seen the settlement, and before the stock was actually transferred: Held, that no trust of the stock was constituted for A., B., and C. *Coningham v. Plunkett*, 2 Y. & C. 245.

2. (*Following moneys realized under voluntary deed.*) A. B. voluntarily assigned to trustees bonds and promissory notes amount-

ing to 600*l.*, in trust for himself and his wife and children, and he handed over the securities. The trustees gave no notice to the debtors. A. B. received 200*l.*, part of the 600*l.*, (the securities having been returned to him by the trustees,) and the remainder was lost by the insolvency of the debtors. A. B. invested the 200*l.*, with other moneys of his own on freeholds, and by writing acknowledged the 200*l.* to be trust property. He afterwards deposited the title-deeds with the trustees as a security for the whole 600*l.*: Held, that the equitable mortgage was valid to the extent of 200*l.* but no further. *James v. Bydder*, 4 B. 600:

3. (*Leasehold for lives—Benefit of renewal.*) A. being entitled to a leasehold for lives, by voluntary deed settles it, after the lives of himself and wife, on his sons by a former marriage; afterwards, by another voluntary deed, assigns it in trust for himself for life, remainder to his wife for life, with an absolute power of appointment. Upon his death his wife enters into possession, not having, it appears, notice of the first settlement, and having taken a renewal, appoints the estate: Held, nevertheless, that the renewal enured for the benefit of those interested under the first deed. *Waters v. Bailey*, 2 Y. & C. 219.

WILL. (*Appointment—Election.*) Testator, being tenant for life of leaseholds, with remainder to his children as he should appoint, and in default of appointment to them equally, having procured a renewal in his own name, which it was held enured for the benefit of the trust, by his will confirmed the settlement, and gave "all his freeholds and leaseholds" to his son, and a legacy to his daughter: he had other leaseholds: Held, that the will was not an execution of the power, and that the daughter was not put to her election. *Tanner v. Elworthy*, 4 B. 487.

2. (*Construction—Absolute interest.*) A testator resident abroad gave a legacy to A., "or in case of his decease, or at his decease, to be equally divided amongst his children." He gave other legacies in similar terms to B., C., &c., and he directed these sums to be paid to the above persons, then residing in Wales; and he appointed executors in trust, to send them to the respective individuals within six months: Held, that the parents took absolute interests. *Arthur v. Hughes*, 4 B. 506.

3. (*Same.*) Held that a bequest of 2000*l.* in trust for testator's

niece, who was then unmarried, with a bequest over if she should die without leaving any issue to attain twenty-one, gave her only an estate for life, as the death referred to could not be construed to mean a death in the lifetime of the testator. *Daniel v. Warren*, 2 Y. & C. 290.

4. (*Construction—Accumulations—Tenant for life or in tail.*) Where after a devise for successive estates for life, with remainders in tail, subject to a term of ninety-nine years, the trusts of such term were declared to be that the trustees should, out of the rents and profits of the estates, insure the messuages, and keep the same in good repair during the respective lives of the several tenants for life, and should, during the respective minorities of each and every person thereby made tenants for life or in tail, apply the surplus or residue of the rents and profits for and towards the maintenance and education of the tenants for life or in tail, who for the time being should be entitled in possession to the estates; and in case the whole of the surplus of the said rents and profits should not, during the minority of any such tenant for life or in tail as aforesaid, be applied for his or her maintenance and education, then the surplus thereof was from time to time to be laid out on real or government securities, at interest, in the names of the trustees, upon trust for such person or persons from time to time as for the time being should under the limitations of the will be entitled in possession to the said estates; and if any person who might become entitled in possession or remainder to an estate tail in the estates under any of the said limitations should die under twenty-one, without issue inheritable to such estate tail, then so often as any such event should happen within the period of time in which executory devises were allowed by law to take place, the absolute interest in the moneys so directed to be laid out and invested was to be considered as not having been vested in such person, but the same was to go over to the next taker: Held, that the first tenant for life in possession of the estates was not absolutely entitled to the accumulations of the rents and profits which had accrued during his minority, but was only tenant for life of such accumulations. *Crosse v. Glennie*, 2 Y. & C. 237.

5. (*Construction—Additional legacy—Trust.*) Where testator by his will gave annuities to his sister A. and other females, which

he declared by a general clause were for their separate use; and by a codicil gave "to each of his sisters 100*l.* a year in addition to the legacies given by the will:" Held, in the case of A. that the annuity given to her by the codicil was also for her separate use. *Day v. Croft*, 4 B. 561.

6. (*Construction—Annuity.*) Bequest of annuity to A. and B., and to the survivor for life: and if A. should have any "children," then to be equally divided between them; but if A. should die "without lawful issue," then to A. and his heirs forever: Held, that the children of A. took absolute interests in a perpetual annuity. *Robinson v. Hunt*, 4 B. 450.
7. (*Construction—Charge of debts.*) Testator commenced his will with a direction that all his debts and all his funeral and testamentary expenses should be paid by his executors as soon as conveniently might be after his decease: Held, upon the construction of the whole will, that this clause had not the effect of charging the real estate of the testator, whether devised to the executors or otherwise, with the payment of his debts. *Symons v. James*, 2 Y. & C. 301.
8. (*Construction—Conversion of leaseholds.*) Where testator, after giving some legacies, gave all other his property of every description in trust for his sister, and after her death then for his niece, and after her death then for her children in equal shares, and if she should die without leaving issue to attain the age of twenty-one, the property to be sold and divided between other parties: Held, that the leasehold part of the property was to be enjoyed in specie till the time appointed by the will for the sale. *Daniel v. Warren*, 2 Y. & C. 290.
9. (*Construction—Failure of issue.*) Where legacies were given to each of four persons, and "in case of the demise of any of them without legitimate issue, then his or her proportions to be divided equally among the survivors," and one of the legatees died without having been married; and by a previous order upon this point being raised, the legacies were carried to the separate account of the legatees, the dividends to be paid to them for life or until further order: the court considering this as a decision that the legacies were for life, and seeming to think it right, declared the survivors absolutely entitled to the share of the deceased. *Ranelagh v. Ranelagh*, 4 B. 419.

10. (*Construction—Inconsistent words.*) Where leaseholds were bequeathed to three for life, subject to certain annuities, and after the death of the three, "to A. B. if then living, her executors, administrators, and assigns, subject to the said annuities during her life," and in the event of her death living either of the three, the property was given to her issue: the court held, with some hesitation, that A. B. took only for life. *Morrall v. Sutton*, 4 B. 478. (The case is now under appeal.)
11. (*Construction—issue.*) It does not follow because the word "issue" in one part of the will means children only, that it should have that meaning also in another part; and where, after a bequest to A. and B. and their issue, in the sense of children, the residue was given to A. and B. equally, and to be divided between them, with benefit of survivorship, upon the death of either under twenty-one; not to be subject to the control of their husbands, but to be held in trust for them and their issue respectively until they attained twenty-two, if unmarried, or if married, until a proper settlement could be made upon them and their issue, so that they should receive the dividends exclusively of their husbands, and if they both died under twenty-one, and without issue, then over; both attained twenty-one, and one of them died leaving children and grandchildren: Held, that both were entitled to her share *per capita* as tenants in common. *Head v. Randall*, 2 Y. & C. 231.
12. (*Construction—Period of survivorship.*) Testator bequeathed the residue of his real and personal estate, upon trust for his daughter absolutely upon her attaining twenty-one; provided that in case his said daughter's decease should happen before the said age of twenty-one, and his, the testator's wife should then be living, then in further trust to pay her the whole interest of the residue of his estate and effects; and on her decease, his said daughter being dead before the age of twenty-one, he devised to his wife the house in S. Street, her heirs and assigns, forever; then in further trust to pay the produce of his residuary estate unto and amongst his nephews and nieces, the children of his sister Ann, and such of them as should be then living: the daughter died without issue in the lifetime of the wife: the sister had five children living at the death of the daughter, and one only, Isaac, living at the death of the wife: Held, that Isaac was entitled to the whole residue. *Hetherington v. Oakman*, 2 Y. & C. 299.

13. (*Construction—Real estate.*) Held that leaseholds were not comprised under the description of "messuages, lands, tenements, and real estate," the testator having also freehold and copyhold property. *Parker v. Marchant*, 2 Y. & C. 279.
14. (*Construction—Residuary or specific.*) Held, as against a claim by pecuniary legatees to marshal, that where there was a gift of all property, freehold, copyhold and leasehold at particular places, and elsewhere in the county of Somerset, and all other real and personal estates whatsoever (testator not having, as it appeared, and the court observed, any real or leasehold property except in Somersetshire), that the gift was specific and not general, and therefore not liable to be marshalled, either as to the leasehold or other property. *Symons v. James*, 2 Y. & C. 301.
15. (*Construction—Residue.*) Testator directed his executors to pay the wife of testator 400*l.* a year out of the income of a fund arising from the sale of real estate, and to apply the remaining income of the fund for the maintenance and education of his children until they attain twenty-one, and then his will was that they should respectively receive the principal, or one-fifth part of such sum as may remain after reserving a sufficient capital, the interest of which should pay the said annuity of 400*l.* and two legacies: Held, that the capital producing the 400*l.* was not included in the devise, but resulted to the heir. *Watson v. Hayes*, 5 M. & C. 125.
16. (*Construction—Revocation—Charge of debts.*) A testator devised an estate, H., and other estates, to A., charged with annuities; and an estate Y., and his residuary real and personal estate to B., subject to the payment of his debts, funeral expenses, and legacies: he afterwards revoked so much of the second devise as included Y., and devised it, subject to the same annuities, and in the same manner as the estate H.: Held, that the charge of debts, &c. on Y. was revoked. *Ravens v. Taylor*, 4 B. 425.
17. (*Construction—Uncertainty of object.*) Under a bequest to "the Westminster hospital, Charing cross:" Held, that the Charing cross hospital was entitled in preference to the Westminster hospital, situate near Westminster abbey, and the royal Westminster *Ophthalmic* hospital, though situate nearer to the Charing cross statue than the hospital first mentioned. *Bradshaw v. Thompson*, C. 295.

18. (*Construction—Vesting Maintenance.*) Direction to executors to apply 25*l.* per annum for the maintenance of testator's daughter till twenty-one or marriage, which should first happen, when his executors were thereby required to pay to her 500*l.*; she died under twenty-one and unmarried: Held, that the legacy failed. *Watson v. Hayes*, 5 M. & C. 125.

APPEALS ON REPORTED CASES.

CHARITY. *Attorney-General v. The Fishmongers' Company*, 2 B. pp. 151, 588. The decision in this case, establishing the right of the Fishmongers' company, both as to the Kneseworth charity lands and those held under Preston's will, affirmed. 5 M. & C. 11, 16.

PERPETUITY. *Ibbetson v. Ibbetson*, 10 S. p. 495. The decision in this case, avoiding a limitation of personal chattels, as too remote, affirmed. 5 M. & C. 26.

POWER. *Easum v. Appleford*, 10 S. p. 274. The decision excluding an appointment for want of reference, affirmed. 5 M. & C. 56.

VENDOR AND PURCHASER. *Sainsbury v. Jones*, 2 B. p. 462. The decision in this case, dismissing a bill for relief in the alternative against an unauthorized agent, affirmed. 5 M. & C. 1.

WILL. *Clapton v. Bulmer*, 10 S. p. 426. Decision given to next of kin, to the exclusion of personal representative, affirmed. 5 M. & C. 108.

ADMIRALTY.

[Selections from 1 Robinson, Part 2.]

BOTTOMRY. (*Bond under compulsion.*) Bond given by the master while under arrest, at the suit of the bondholder, upheld, one of the circumstances being that a further advance was made when the bond was given, but no costs were given to the bondholder. *The Heart of Oak*, 204.

2. (*Enforcing bond before end of voyage.*) A bottomry bond may be enforced before the arrival of the ship at her destination, if such bond has been obtained by fraudulent misrepresentation, and more particularly if the misstatement be as to the intended course of the ship. *The Armadillo*, 251.

BOTTOMRY BOND. (*Distinct defences—Costs.*) Where on a claim under a bottomry bond against the ship, freight and cargo, judgment was allowed to go by default against the ship and freight, but the claim as to the cargo was contested by the consignees, the bondholder was held entitled, in the absence of any special circumstances, to have the value of the ship and freight paid over to him, although the consignee wished to have it retained in court to answer the costs of the claim against them. *The Lord Cochrane*, 312.

COLLISION. (*Foreign ship—Reciprocity.*) In a case where the vessel damaged was foreign, and the defence was that the other vessel had a licensed pilot, it was held no answer to the defence, that it would not have been good in the country of the ship damaged. *The Vernon*, 316.

2. (*Liability of steam tug.*) A steam tug employed in towing a vessel in the river Medway, held not responsible for a damage occasioned by the vessel in tow coming in contact with another vessel; the vessel in tow having a licensed pilot on board at the time, and no error or negligence being established on the part of the crew of the steam tug. *The Duke of Sussex*, 270.
3. (*Rule as to steamers.*) Where two steam vessels must unavoidably and necessarily cross so near, that by continuing their respective courses there would be a reasonable probability of a collision, each vessel shall put her helm to port, so as to pass on the larboard side of each other. *S. C.* 274.
4. (*Rule for steering.*) Where a light vessel with the wind free meets a laden vessel close hauled, it is the duty of the former to give way, and the latter is to keep her course. *The Harriett*, 182.

DESERTION. (*Construction of 5 & 6 Will. 4, c. 19, s. 2.*) The words "nature of the voyage" must have such a rational construction as to answer the leading purpose for which they were framed, viz. to give the mariner a fair intimation of the nature of the service in which he engages. *The Westmoreland*, 216.

2. (*Old law.*) In cases of alleged desertion, the application of the ancient maritime law is not excluded by the statute 5 & 6 Will. 4, c. 19. Imprisonment of the mariners for so going on shore is an important ingredient in the case, as taking away all *locus penitentiae* and all opportunity of returning to their duty on board the ship. *S. C.*

HARBOUR DUES. (*Improper seizure by harbour master.*) An attachment decreed against a harbour master for seizing and carrying off for non-payment of harbour dues, portions of the rigging of the ship whilst in the custody of the officer of the court. *The Harmonie*, 179.

JOINT CAPTURE. (*Evidence.*) In cases of joint capture, the log-book of vessel claiming is no evidence. *The Sociedad Felix*, 303.

LIEN. (*Lien for repairs.*) The right of a tradesman to retain the materials of a ship, left in his possession for the purpose of repairs, until the repairs are paid for, does not extend against the authority of the court of admiralty, where the ship is in possession of its officer, under a warrant of the court. *The Harmonie*, 178.

PILOT. (*Authority to appoint—Locality—6 Geo. 4, c. 125.*) Held, in a case of collision, that, under the above statute, the vessel doing the damage going down channel, and the damage being done between London and the Isle of Wight, that a pilot appointed by the Trinity house was a duly licensed pilot within the locality; but *semble*, if the vessel had been proceeding up channel, between the Isle of Wight and London, the pilot should have been one appointed by the warden of the cinque ports. *The Vernon*, 316.

POSSESSION. (*At whose suit changed.*) The power of the court of admiralty to interfere for the purpose of altering the possession of a vessel, is confined to cases where the majority of interests is with the party invoking the court's interference. Motion to change the possession at the petition of a moiety of the interest rejected. *The Elizabeth and Jane*, 278.

PRACTICE. (*Affidavit.*) Affidavits sworn before masters extraordinary in chancery must state in the jurat the place where they were sworn. *The Reward*, 174.

2. (*Form of proceeding—Bottomry.*) In proceedings in the court of admiralty, the suitor is entitled to choose his own mode of proceeding, whether by act on petition, or by plea and proof.

Libel in the cause of bottomry admitted. *The Minerva*, 169.

PRODUCTION OF PAPERS. (*Jurisdiction—Nature of cause.*) The court of admiralty will not interfere to compel the production of a ship's papers, retained by an agent, upon the *ex parte* affidavit of the owners, the case not being an original cause of pos-

sion, in which the court would have the power to make an order for the production of the ship's papers as incidental to the cause.

The Lusitano, 166.

SALE UNDER DECREE. (*Foreign ship—Register.*) In cases of sale under a decree of the court, the transfer of the ship's register is not essential to the validity of the purchaser's title. The title conferred by the court in the exercise of its authority in decreeing the sale, is sufficient title against the whole world. Monition against the American consul to bring in the register of an American ship, sold at Liverpool in a cause of bottomry, refused. *The Tremont*, 163.

SALVAGE. (*Agreement—Cargo.*) The court will not enforce any agreement for salvage of the ship exclusive of the cargo, such agreements tending to fraud upon the owners of the cargo. *The Westminster*, 229.

2. (*Consolidation of claims.*) Consolidated action by two sets of salvors, dismissed for want of merits in the original salvors, but a separate claim by the second salvors for their own services afterwards sustained. *The Neptune*, 297.

3. (*Cargo of stranded vessel.*) Salvage awarded for cargo saved from a stranded vessel, and some tin, part of the cargo, which also served for ballast, included in the computation. *The Westminster*, 229.

4. (*Insurance.*) In apportioning a salvage remuneration between the owners and crew of a salving vessel, the share of the owners will not be increased by the probable vitiation of a policy of insurance effected upon the ship. In directing an apportionment, the court will consider every vessel as uninsured. *The Deveron*, 180.

5. (*King's ships.*) Crews and officers of king's ships entitled to salvage on the same footing as others. *The Wilsons*, 172.

SLAVE SHIP. (*Contest between different seizers.*) A wrongful dispossession of original seizers confers no title to the second seizers in the bounties awarded by act of parliament on the tonnage of a condemned slave ship; 96*l.* paid by the lords of the treasury, as bounties to the agent of the second seizer, directed to be brought in and paid over to the agent of the original seizers. *The Eagle*, 236.

2. (*Joint capture—Grounds of claim.*) In cases of joint capture

of slave vessels, the claim of the joint captors must, subject to the exceptions which peculiar circumstances may suggest, be governed by the principles adopted with respect to cases of joint capture in the prize court of admiralty; and in order to sustain the claim of the vessel asserting an interest in the joint capture, it must be pleaded, 1st, that there was an association and co-operation with the capturing vessel; 2dly, that the vessel claiming was seen by the captured slaver at the time the capture was effected. *The Sociedade Felix*, 303.

3. (*Jurisdiction—Construction of treaty with Spain.*) The treaty with Spain, 28th June, 1835, was not meant to apply to questions arising between the subjects of one only of the states, and accordingly it was held, that the court of admiralty was not excluded, by a sentence of the mixed commission court, from considering the question to whom the bounties or the proceeds arising from the condemnation belonged. *The Eagle*, vol. i. 236. 251.

SURETY. (*Discharge of, by variation of contract.*) The principles of other courts of law as to the discharge of surety, by variations of the principal's liability without consulting the surety, obtain also in the admiralty courts, and where, after the ordinary bail given in a suit for damage, the plaintiff obtained a decree, with a reference to settle the amount of damage, and then without prosecuting the decree agreed with the defendant as to the amount of the damage, and took from him four bills, at the respective dates of two, four, and six months, without the consent of the bail: Held, that the latter was discharged. *The Harriett*, 186.

WAGES. (*Drunkenness.*) *Semble*, that drunkenness, to be used as a defence to a claim for wages, must be specifically pleaded. *Duchess of Kent*, 283.

2. (*Occasional misconduct.*) In order to deprive a mariner of his right to his wages, either general negligence or misconduct, or single acts of misconduct, followed by loss to the owner, must be shown. *S. C.*

HOUSE OF LORDS.

[Selections from 8 Clark and Finnelly, Part 4; 9 Clark and Finnelly, Part I.]

AGREEMENT. (*Estoppel.*) A. having obtained a patent for the application of the principle of smelting iron by the use of heated

air applied to furnaces, entered into an agreement with B., dated 11th November, 1833, by which, "in consideration of the payment of 1s. per ton upon the whole iron which should be smelted from the date of the agreement till the expiring of the letters patent, by the use of heated air in any of the modes heretofore applied, or in any other mode falling under the same patent," N. was to grant to B. a license, which further on in the agreement was described to relate to "the application or use of heated air in any of the modes heretofore practised at B.'s works, or in any other mode falling under the description in the said patent, or in the specification thereof." N. afterwards instituted a suit to compel B. to perform this agreement. B. instituted a cross suit to suspend N.'s proceedings, on the ground that the process of smelting by heated air, used at B.'s works, did not fall within the patent. Held, by the lords, affirming the decree of the court of session, that, after this agreement, B. could not set up such a defence to the claim of N. *Baird v. Neilson*, 8 C. & F. 726.

HUSBAND AND WIFE. (*Jointure—Bar to wife's right under Statute of Distributions.*) On the marriage of A., a certain sum was settled in trust for her for life, "as and for her jointure, in full lieu, bar, and satisfaction of any dower or thirds which she could or might claim at common law, out of all or any of the estates, real, personal, or freehold," of her intended husband: Held, affirming the decree of the court of chancery of Ireland, that this settlement barred her claim on the personal estate of her intestate husband, under the statute of distributions. *Gurly v. Gurly*, 8 C. & F. 743.

JOINT STOCK COMPANY. (*Relief of company against its own acts.*) A. agreed with P., in consideration of 165,000*l.*, to grant to P. a lease of certain mines, as trustee for a joint stock company, which P. undertook to form; the lease was afterwards executed to P., as managing director, and the company entered into possession and worked the mines, and paid part of the purchase money. A. died, making P. his executor, who filed a bill against V., then managing director of the company, for an account and payment of what remained due to A. of the purchase money. V. answered, and then filed a cross bill on behalf of the company, alleging misrepresentation as to value, and other frauds practised

by A. and P. on the company, and praying to have a lease granted to them at the true reduced value, or that the said agreement might be declared fraudulent and void. Held, 1st, that the company was not in this form of suit entitled to any relief from the agreement, as it was in fact an attempt to get relief against their own acts: 2dly, that A.'s executor was entitled to the account and payment prayed by his bill. *Vigors v. Pike*, 8 C. & F. 564.

POWER OF LEASING. (*Covenant for renewal inconsistent with power.*) On the marriage of T. P., a settlement was made of certain lands held on a lease for lives renewable forever. The settlement gave T. P. an estate for life, and contained the following power of leasing: "It shall be lawful for T. P. and all and every other person or persons to whom any use is hereby limited, when in actual possession of the said lands, &c., to demise the said lands for any number of lives or years, consistent with their respective interests therein, to commence in possession, and not in reversion, remainder, or expectancy," reserving the best rents, without taking any money by way of fine, &c. T. P. granted a lease to A. P. at a farm rent, for the lives of three persons therein named, with a covenant, that on failure of any of the three lives, the lessor, his heirs and assigns, would on the payment of 5*l.* as a fine upon each life as should happen to die, add to the time and term of the lease the life of another person, named by the lessee, from time to time successively forever. Held, that this lease was not warranted by the power; and a decree by the court of chancery in Ireland, directing against the remainderman specific performance of the covenant of renewal, was reversed, and the bill ordered to be dismissed, with costs. *Clark v. Smith*, 9 C. & F. 127.

PRIVATE ACT. (*Notice.*) A party interested in the subject matter of a private act of parliament will have his rights affected by its provisions, though it may have been introduced and passed without notice duly given to him. *Edinburgh Railway Company v. Wauchope*, 8 C. & F. 710.

RAILWAY ACT. (*Construction—Toll on passengers.*) A railway act gave to W., a landed proprietor, through whose land the railway was to pass, "the sum of one halfpenny per ton upon all goods and articles upon which a tonnage duty is charged or chargeable in virtue of this act." The section which empowered

the railway company to levy a tonnage duty contained this clause: "For every carriage conveying passengers, or goods or parcels not exceeding five cwt.," a sum named. There were other clauses fixing the duty payable for goods, but there was no other which referred to passengers: Held, affirming the decree of the court of sessions, that the company was empowered to levy a tonnage duty on carriages according to their weight when containing passengers; and that the sum to be paid to W. must be calculated on the tonnage so levied, and that he was entitled to arrears of such toll for some years before his claim. *Edinburgh Railway Company v. Wauchope*, 8 C. & F. 710.

SURETY. (*Annuity deed—Construction—Evidence.*) By a deed of annuity, in consideration of 9000*l.* therein stated to be paid to L., E., M., and M., the said L. granted to Messrs. D. and H. an annuity or clear rent of 1800*l.* for three lives, charged upon his estate: and L., E., M., and M. covenanted to pay the said annuity or yearly rent, with a proviso for purchase by them, or any or either of them: and they executed their joint and several bond and warrant of attorney to confess judgment on the bond, the judgment to be as a further security for the annuity, and to be entered forthwith against L. and E., but not against M. and M. until default of payment, and execution not to be entered on the judgment against L. and E. until the annuity should be forty days in arrear; and E., for further securing the annuity, agreed, in the event of not becoming the purchaser of L.'s estate in twelve months, to assign, at L.'s expense, a mortgage which E. held on it, and also to procure the guarantee of a competent person for payment of the annuity: Held, by the lords (reversing the decree of the court below) that evidence was inadmissible to assist the construction of the deed, and that upon the construction of the deed E. was a principal grantor of the annuity, and not a surety. *Hollier v. Eyre*, 9 C. & F. 1.

TRUST. (*Purchase of charge by trustee.*) A trust was created by a debtor for the benefit of creditors, and the trustee had the power to bind the debtor personally and heritably for the benefit of the trust. By the terms of the trust deed, the trustee was likewise required to do all in his power to keep the residue of the trust estate as large as possible for the debtor. The trustee pur-

chased an annuity granted by the debtor after the date of the trust deed. The trustee died. His representatives sought to enforce the annuity against the grantor. It was held that they could not do so, and a decree of the court of session affirming their right was reversed. *Hamilton v. Wright*, 9 C. & F. 111.

VENDOR AND PURCHASER. (*Misdescription not causing loss.*) A manor was described in the advertisements and the particulars of sale as a manor in which the fines were arbitrary; adding, that the clear profits on an average of the last eight years had been 150*l.* a year; and it was one of the conditions of sale, that if there should be any error or misstatement in the particulars, the vendors or purchaser, as the case might happen, should pay or allow a proportionate value, according to the average of the whole purchase money, as a compensation either way. After the sale it was found that by the custom of the manor arbitrary fines were payable only on alienation, and that on the death of a tenant, his customary heir paid, upon admittance, a small fixed sum, and the widow was admitted to her free-bench without any payment. It was also found that the clear profits exceeded 200*l.* a year: Held, (reversing a decree made on a bill, which was filed by the purchaser for specific performance, with compensation in respect of the misstatement as to the fines,) that there was no such misdescription as would entitle the purchaser to compensation, inasmuch as the annual profits far exceeded the amount stated. *White v. Cuddon*, 8 C. & F. 766.

2. (*Sale by trustee—Compensation.*) *Semble*, that in a case of misdescription, a court of equity would not enforce against trustees specific performance with compensation, as being prejudicial to the *cestui que trust*. *White v. Cuddon*, 8 C. & F. 766.

WILL. (*Construction—Description of subject.*) A. being seised of certain lands at K., in the county of C., demised them to B. for three lives; B. agreed to assign the lease for lives to C., and C. entered into possession of the lands, and obtained from A. a lease of the same lands for 999 years at a peppercorn rent during the continuance of the lease for lives, and afterwards at 100*l.* a year. C., having these interests in the lands, made his will, in which was the following clause: "I order all my freehold interests in the county of C., &c., except my interest in K., which I hold

under A., to be sold, and the money arising, &c., to be divided:" Held, affirming the decree of the court of chancery of *Ireland*, that C.'s interest in the lease for lives was disposed of by this clause in the will. *Gurly v. Gurly*, 8 C. & F. 743.

APPEALS ON REPORTED CASES.

ANNUITY. *Haworth v. Bostock*, 4 Yo. & Col. 1. The decree in this case, dismissing the bill for arrears of the annuity, varied by retaining the bill for twelve months, with liberty to plaintiff to bring action. 9 C. & F. 59.

HUSBAND AND WIFE. *Jones v. Waite*, 5 Bing. N. C. 341. The judgment of the court of exchequer chamber, establishing an agreement by a third party, made in consideration of husband executing a deed of separation, affirmed. 9 C. & F. 101.

RAILWAY ACT. *Simpson v. Lord Howden*, 2 P. & D. 714, 731. The judgment of the court of exchequer chamber, establishing an agreement under seal by railway company to give an exorbitant price to lord Howden for his land, affirmed, the question of fraud not being raised by the pleadings. 9 C. & F. 61.

WILL. *Collison v. Curling*, 4 M. & C. 63. The decision of the lord chancellor, declaring the legacy not adeemed by change of investment, affirmed. 9 C. & F. 88.

DIGEST OF AMERICAN CASES.

[Selections from 4 Metcalf's (Massachusetts) Reports; 4 Weston's (Vermont) Reports; 2 M'Lean's (U. S. Circuit Court) Reports; 11 Gill & Johnson's (Maryland) Reports.]

ACTION. (*Debt on bond payable by instalments.*) On a bond payable by instalments, debt cannot be sustained until they shall all become due; but if the payment be secured by a penalty, debt may be brought. When there is no penalty covenant is the proper action for the instalments on a bond, or assumpsit, if the instalments be due by simple contract. *Fontaine v. Aresta*, 2 M'Lean 127.

AGENT. (*Lien of factors.*) A factor has a lien on the property of the principal in his hands for all advances made, and for any balance that may be due; also for responsibilities incurred by the factor for the principal in the general course of their business. But this lien is put an end to by a voluntary delivery of the property. The factor or agent cannot stop property in transitu, where he has voluntarily delivered up the possession of it, on any pretence that he has a lien upon it for advances made on account of the principal. Having parted with the possession of the property he has relinquished his lien and cannot reassert it. *Matthews et al. v. Menedger*, ib. 153.

2. (*When factor not liable for solvency of purchaser.*) A factor sold goods of his principal to several different purchasers, on credit, and also sold his own goods, on credit, to one of the same purchasers, and took a note payable to himself for the amount of his own goods and those of the principal: He rendered an account of sales to his principal, stating at the foot thereof that the balance would be "due by average, if collected," on a certain day, and directed the principal to charge him "with sales due on" that day, the amount of the balance of said account: He afterwards made advances to the principal, and gave him a negotiable note, payable on demand, for the balance of the account as before rendered:

The purchaser, of whom the factor took a note, as aforesaid, failed before the term of credit had expired, and paid nothing for the goods for which his note was given: Held, in a suit on the note thus given by the factor, that these facts did not show conclusively, that he was bound to pay the note in full, as they did not show a final settlement and payment of the account; but that, on these facts, so much of the consideration of the note as included the debt of the insolvent purchaser, had failed, and that, for so much of the note the factor was not liable. *Hapgood's executors v. Batcheller*, 4 Metcalf 573.

3. (*Liability of agent in contract for his principal.*) In simple contracts, executed by agents, if the agent exceed his authority, he thereby binds himself, although he execute the contract in the name of the principal. So, too, if the credit is given to the agent, and he expressly consent to bind himself. But if he have authority to bind the principal, and the credit is given to the principal, and the promise is made on behalf of the principal, the agent is not liable. Where the agent exceeds his authority, in *contracts under seal*, in many cases, the more appropriate remedy is by a special action on the case. *Roberts v. Button et al.*, 14 Vermont 195.

ASSUMPSIT. (*When indebitatus assumpsit lies.*) If the plaintiff fails to prove the special contract laid in his declaration, or the contract has been performed on his part, and a duty is imposed on the defendant to pay the amount due in money, the plaintiff may recover on the general counts. *Ames v. Le Rue*, 2 M'Lean 216.

2. (*Same.*) No recovery can be had in the action on book where the contract is *executory*, and unrescinded, though in part executed. *Smith v. Smith*, 14 Vermont 440.
3. (*Use and occupation.*) A. made an oral agreement for the purchase of B.'s house, advanced the purchase money, and took possession. Before A. obtained a deed, the house was destroyed by fire, and he thereupon vacated possession of the ground, refused to accept a deed which B. tendered him immediately after the fire, and commenced a suit against B. in which he recovered back the purchase money: Held, that A. during his occupation of the house, was tenant at will, and that he was liable to B. in an action of

assumpsit for use and occupation: Held also, that A., by refusing to accept a deed from B., determined the tenancy at will, and was no longer liable to him for use and occupation. *Gould v. Thompson*, 4 Metcalf 224.

4. (*Consideration*.) The compromise of a doubtful claim or defence is a sufficient consideration for a promise. *Barlow v. Octah Ins. Co.*, ib. 270.

BANKRUPT LAW. (*Operation on state insolvent law.*) The act of congress to establish a uniform system of bankruptcy throughout the United States does suspend the operation of the law of this commonwealth, entitled "an act for the relief of insolvent debtors and for the more equal distribution of their effects," as to all persons and cases that are within its provisions. *Judd v. Ives*, ib. 402.

This consequence of the act is limited to cases instituted under the insolvent law subsequent to the period when the bankrupt law went into operation, and it cannot supersede or suspend proceedings rightfully commenced under the insolvent act prior to the time of its going into operation. *Id.*

BILLS OF EXCHANGE AND PROMISSORY NOTES. (*Negotiability.*) To bring a note within the statute of Anno, which has been generally adopted in this country, it must be payable in money, and not in stocks, funds or current paper, and must be for a sum certain, subject to no conditions. Therefore a note executed in Michigan, payable in New York, in New York funds or their equivalent, is not negotiable. *Hasbrook et al. v. Palmer et al.*, 2 M'Lean 10.

2. (*Same.*) An order in this form—"Pay J. or order \$300, if the same may be due him from me on his and my settlement, out of the last payment due from you to me, on houses which I am now building for you"—and accepted by the drawee, cannot be declared on as a bill of exchange: But the drawee, in order to maintain an action thereon against the acceptor, must aver and prove that, before action brought, there was due to the drawee, upon a settlement with the drawer, \$300 or some other sum, and also that a sum of money was due from the acceptor out of the last payment to be made by him to the drawer on the houses mentioned in the order. *Jackman v. Bowker*, 4 Metcalf 235.

3. (*Declaration.*) An averment in the declaration that A. B. by C. D. made a certain bill or check, is sufficient. The declaration might have contained an averment that C. D. was duly authorized to act as the attorney in fact of A. B., but such an averment is unnecessary. *Sherman v. Comstock*, 2 M'Lean 19.
4. (*Checks—Notice of non-payment.*) The holder of a check must give notice to the drawer, if payment by the bank be refused. And a declaration on such an instrument is defective if notice be not averred. *Ib.*
5. (*Partnership.*) Where a note was given by A. & L., it is unnecessary in the declaration to aver a partnership. *Davis v. Abbott*, *ib.* 29.
6. (*Rate of Exchange.*) The rate of exchange between two places is not exclusively regulated by the expense of transporting specie from one place to the other. Therefore where A. & B. are the two points in the contract, the true rule is the current rate at which drafts on B. sells at A. *Balch v. Colman*, *ib.* 85.
7. (*Title of indorsee.*) If the maker of a note prove that it was fraudulently obtained, that throws suspicion on the note and devolves on the holder the necessity of proving that he received the note in the due course of business, and paid for it a valuable consideration. *M'Clintock v. Cummins*, *ib.* 98.
8. (*Indorsement with guaranty.*) An indorsee of a note who increases his liability by indorsement, beyond what the law implies, as by stipulating that the note shall be paid at a particular place, is to be considered as a guarantor. And this new contract can only be enforced between the parties to it. It does not pass to any subsequent assignee. *Hew v. Kemball et al.*, *ib.* 103.
9. (*Release of prior parties.*) A release of a remote indorser by the holder of a note, is a discharge of the subsequent indorsers. *Hawkins et al. v. Thompson*, *ib.* 111.
10. (*Demand at the place where payable.*) When a note is made payable at a particular place, it need not be demanded, and of course such demand need not be averred in the declaration. *Thompson v. Cook et al.*, *ib.* 122.
11. (*Note to several in the disjunctive.*) When a note is given to A. B., C. D., E. F., or G. H., either of the promisees may bring the action in his own name. The promise to pay is to either of

- the promisees in the alternative. In such a case it is not necessary to set out the note in terms in the declaration, but it is sufficient to state it according to its legal effects. *Spaulding v. Evans*, ib. 139.
12. (*Evidence.*) In an action by indorsee against indorser, it is sufficient to prove the indorsement without proving the execution of the note. *Kendall v. Freeman*, ib. 139.
13. (*Evidence of money had and received.*) The acceptance of a bill is evidence against the acceptor in behalf of the drawer, of so much money, under the money counts. *Benjamin v. Tillman*, ib. 212. *Fraser v. Carpenter et al.*, ib. 235.
14. (*Value received.*) In a bill of exchange or other negotiable instrument, the words value received are not necessary. *Ib.*
15. (*Acceptance of bills.*) A letter written within a reasonable time before, or after, the date of a bill of exchange, describing it, and promising to accept it, is a virtual acceptance. An authority to draw several bills of exchange, payable at specified periods, with an assurance that the bills should be paid, is an acceptance to the person who takes the bill on the credit of such an authority. *Bayard v. Lathy*, ib. 462.
16. (*Failure of consideration.*) Where the action is on a promissory note, a failure of the consideration is a good defence. And it is immaterial whether the consideration was land, or other property. A partial failure of consideration cannot be set up as matter of defence. On this point there is a conflict in the decided cases, but the weight of authority requires a total failure of the consideration. Where the defendants gave their note for a tract of land, which belonged to the United States, and to which the plaintiff could have no title, the defendants may plead the fact, to an action on the note. *Scudder v. Andrews*, ib. 464.
17. (*Suit on lost note which has been assigned.*) On a lost note which has been assigned, suit must be brought in the name of the assignee. The promisee being in possession of the note, and having assigned it merely for the purpose of collection, may strike out the assignment, and sue in his own name. The legal right is vested in the assignee, and can only be divested by striking out the assignment as above, or by re-assignment. *Leavitt et al. v. Cowles et al.*, ib. 491.

18. (*Indorsement for precedent debt.*) A precedent debt constitutes a good consideration on the assignment of a note. And although there may have been fraud or deception in obtaining the note, yet if the holder had no notice of it, the equities between the original parties are not open. A note received in payment of a debt is a transaction in the ordinary course of business. *Riley and Van Amringe v. Anderson*, ib. 589.

19. (*Promise by maker of accommodation note to holder after due.*) An accommodation note, which was made as collateral security for a debt due from a third person to the payee, was negotiated by the payee after it fell due and after the debt had been paid: The holder offered it to A., one of his creditors, on certain terms, and gave him liberty to take it, for the purpose of inquiry, before he should accept or reject the offer: A. presented the note to the maker, telling him he had taken it as money, and asked him if he would pay it: The maker, not knowing that the said debt was paid and the note negotiated after it was due, concealed no fact, of which he was aware, from A., but told him that it was an accommodation note which he did not expect to pay; that he should be obliged to pay it, and would pay it, if three months' time were given him; otherwise, he should contest it. A. then informed the holder that he should not take the note on the terms offered, but proposed to take it on certain other terms, to which the holder assented: After the expiration of three months, A. sued the maker on the note. Held, that the defendant's promise to A. was without legal consideration, and that he was not estopped thereby to make the same defence against A. which he might have made against the payee. *Mackay v. Holland*, 4 Metcalf 69.

20. (*Demand and notice by executor of holder before probate.*) Where the payee of a promissory note, which is made by one citizen of this state to another citizen thereof, indorses it specially to a citizen of another state, who dies and whose will is admitted to probate in that state before the note falls due, and his executor, without taking administration in this state, sends the note to a notary public in this state, with directions to demand payment of the maker at maturity, and the notary demands payment accordingly, which the maker refuses generally, without objecting to the notary's authority, and the notary thereupon gives due notice of

nonpayment to the indorser's executors; such demand and notice are sufficient to charge such executors; and an administrator of the estate of the indorsee within this state, who is afterwards duly appointed here, according to the provisions of the Rev. Sts. c. 62, is thereupon entitled to maintain an action against them on the note. *Rand Admr. v. Hubbard's Exrs.* ib. 252.

21. (*Duty of creditor holding note as collateral.*) Where a note is received, the proceeds to be collected and applied by the creditor to the discharge of his debt, he is bound to use due diligence to collect the note, and to give notice of nonpayment. *Foots and Bowler v. E. and O. Brown*, 2 M'Lean 369.

CHARITABLE USES. (*Devise to unincorporated society.*) A devise of real estate to an unincorporated society, for charitable uses, is valid. The estate, in such case, descends to the heirs of the testator, subject to a trust created by him, which they are bound to execute; and if they do not execute it voluntarily, the court will regulate and enforce the execution thereof. *Bartlett v. Nye*, 4 Metcalf 378.

COMMON CARRIER. (*Stage coaches—Liability of proprietors.*) The law holds a driver to the observance of the strictest care, and the most unremitting vigilance. And however unexceptionable may be his general character as a driver, if, in a particular instance, he is guilty of carelessness or negligence, whereby an injury occurs to a passenger, his employer whose agent he is, is accountable. *Maury v. Talmadge*, 2 M'Lean 166.

CONFLICT OF LAWS. (*Statute of limitations.*) The statute of limitations of the state where the suit is brought, must govern. It is the law of the forum, and applies in all cases where the jurisdiction of the forum is invoked. *Ames v. Le Rue*, ib. 216.

2. (*Title to land governed by the lex rei sitæ.*) No judgment or decree of the courts of any state or territory can operate upon the title to lands in another state or territory. It is peculiarly the province of the sovereign power to regulate, whether by operation of law or by actual conveyances, the transfer of real estate within its own jurisdiction. And no conveyance or will executed in a foreign state, can have any effect except under the laws of the state where the land is situated. *Pratt v. Oliver*, ib. 282.

3. (*Where no evidence is given of the lex loci contractus, resort*

is had to the lex fori.) Where a suit is brought in this state on a note payable, on a day certain, in another state, without interest, the plaintiff is entitled, in the absence of evidence as to the legal rate of interest in that state, to compute interest, by way of damages for nonpayment, at the legal rate of interest in this state. *Wood v. Corl*, 4 Metcalf 203.

4. (*How payment of interest regulated.*) Where a promissory note is made in Canada, and indorsed in this state, in both of which places the rate of interest is six *per cent.* and payable at a day certain in the state of New York, where the rate of interest is seven *per cent.* and not paid when due—both the makers and the indorsers are liable to pay seven *per cent.* interest, as damages, for such delay. *Pecks et al. v. Mayo, Follett, et al.*, 14 Vermont 33.

As a general rule those incidents of a contract, which concern its force and validity, as well as its performance, and damages for non-performance, will be determined by the law of the place of payment. *Ib.*

CONSTITUTIONAL LAW. (*Restriction on legislative power.*)

Where the constitution of Michigan provided that "the legislature shall pass no act of incorporation unless with the assent of at least two-thirds of each house:" Held, that a general banking law, providing for the incorporation of as many associations as individuals chose to form for that purpose, under certain general regulations, was constitutional. *Falconer et al. v. Campbell et al.*, 2 M'Lean 195.

2. (*Courts cannot inquire whether laws were passed by the requisite majority.*) To pass an ordinary act a majority of each house is necessary, but to pass an act of incorporation a majority of two-thirds is required. Now if in the latter case, the majority by which the bill was passed may be denied by a plea, why may it not be done in the former. And if the court may go behind the law and canvass the votes by which it was passed, why may they not investigate the qualifications of the members of the legislature. *Ib.*
3. (*Retrospective legislation.*) The legislature may create a remedy for an existing obligation, but they cannot by legislation create an obligation on a past transaction. And more especially they can-

not subject an individual to a pecuniary penalty for an act which, when done, involved no responsibility. *Ib.*

4. (*Validity of state law laying tax on immigrants for the support of foreign paupers.*) There is nothing repugnant to the constitution or laws of the United States in the third section of *St.* 1837, c. 238, which prohibits the landing of alien passengers, who arrive in any vessel at any port or harbour in this state, until the master, owner, consignee or agent of the vessel, shall pay to the regularly appointed boarding officer the sum of two dollars for each passenger, to be appropriated for the support of foreign paupers. *Norris v. City of Boston*, 4 Metcalf 282.

COURTS. (*Jurisdiction of circuit court of the U. S.*) A suit having been commenced in the circuit court of the United States, is not abated by a subsequent suit in the state court, by attachment against the defendant in the first suit, who is summoned as garnishee. Jurisdiction having vested in the circuit courts, it cannot be divested by any subsequent proceeding in a state court. *Campbell v. Emerson*, 2 M'Lean 30.

2. (*Citizenship of defendant.*) To give jurisdiction to the circuit courts of the United States, the citizenship of the defendants is as necessary to be stated as that of the complainants. *Findlay's exr.* *v. Bank of the U. S. et al.*, *ib.* 44.

3. (*Lien of judgments of circuit court of the U. S.*) The judgments of the circuit courts of the United States are a lien on lands to the extent of their jurisdiction, in the same manner as the judgments of the courts of the state. *Den ex dem. Shrew et al. v. Jones*, *ib.* 78.

4. (*Averment of citizenship.*) A general averment of the citizenship of the plaintiff is sufficient. Where a note has been assigned by a firm, it is unnecessary for the assignee to aver and prove the names of the persons who compose the firm. *Thompson v. Cook et al.*, *ib.* 122.

5. (*Citizenship of assignor.*) The assignee who sues in the circuit court of the United States in his own name, must show that his assignor at the time of the assignment might have brought the suit in his own name. The circuit court having only a limited jurisdiction, it must be shown in the pleadings. *Rogers v. Linn*, *ib.* 126.

6. (*Note payable to bearer.*) A note payable to a payee named or bearer, may be sued for by any person who received it in the course of business in his own name, in the courts of the United States without noticing the payee named. *Bradford v. Jenks*, ib. 130; *Halsted v. Lyon*, ib. 226.
7. (*Receiver of a corporation.*) But the receiver appointed by law upon the dissolution of a bank to wind up its affairs, cannot sue in his own name on a note payable to the bank or bearer, without showing that the bank could have sued. *Ib.*
8. (*Appeals from district to circuit court.*) An appeal from the district to the circuit court, must be prayed for and allowed to the next circuit court held within the district. Such appeals are limited to cases of admiralty and maritime jurisdiction. All other cases are removed by writ of error. *U. S. v. Haynes et al.*, ib. 155.
9. (*Federal courts take notice judicially of general state laws.*) The circuit court of the United States is presumed to know the laws of the respective states, and it is not necessary therefore in a plea setting up a judgment of a state court, to aver that it had jurisdiction. *Woodworth v. Spafords et al.*, ib. 168.
10. (*Jurisdiction of federal courts between citizens of different states.*) By the constitution, jurisdiction is given to the courts of the United States, between citizens of different states. The act of 1789 restricts the exercise of this jurisdiction to cases where one of the parties are citizens of the state where suit is brought. And by the settled construction of this act, where there are more than one party, plaintiff and defendant, the court must have jurisdiction between each party, plaintiff and defendant. This produced great embarrassment in the proceedings before the circuit courts. And to remedy this inconvenience the act of 1839 was passed, which enables a party defendant, who may not reside in the district, voluntarily to become a party to the suit. By his submitting himself in this form to the jurisdiction of the court, the jurisdiction is not ousted. *Taylor v. Cook*, ib. 516.
11. (*Chancery jurisdiction of federal courts.*) The circuit courts of the United States derive their jurisdiction as well in chancery as at law, from the constitution and laws of the Union. The laws and usages of a state, which, at law, constitute a mode of proce-

ture in the circuit courts, derive their force from their adoption by congress. A state cannot enlarge nor restrict the jurisdiction of the courts of the United States. In those states where no courts having chancery powers exist, the chancery powers of the circuit courts are the same as in the other states. But the contract, or right, is governed by the local law, where it originated, and was to be performed. This law, then, constitutes the law of the contract, and will be enforced by the courts of the United States. It does not give a capacity to these courts to exercise jurisdiction, but it fixes the rights of the litigant parties. *Lorman et al. v. Clarke*, ib. 568.

COVENANT. (*Where sealed instrument has been varied by parol.*) A parol enlargement of the time set in a sealed instrument for the performance of covenants, is good; but where there is such enlargement of a condition precedent, the plaintiff loses his remedy upon the covenant itself, and must seek it upon the agreement enlarging the time of performance. *Scott v. Hawsham*, ib. 185.

2. (*Dependant and independant articles.*) Where a contract consists of several distinct and separate stipulations on the one side, and a legal consideration is stated on the other, it must be considered that the entire contract was in the contemplation of the parties in each particular stipulation, and formed one of the inducements therefor, and no one stipulation can be supposed to result from, or compensate for the consideration, or any portion of it, exclusive of other stipulations, unless the parties have expressly so declared. *Stansbury v. Fringer*, 11 Gill & Johns. 149.

And this will be the case, whether the consideration be a sum of money, to be paid in gross, or a specific act to be performed, or several payments in money, or several acts to be performed. *Ib.*

CRIMINAL LAW. (*Nolle prosequi when it may be entered—its effect.*) The prosecuting attorney has a right, with leave of the court, to enter a nolle prosequi on a bill of indictment, and it constitutes no bar to a subsequent indictment for the same offence. But after the jury are impannelled and witnesses sworn, the prosecuting attorney has no right to enter a nolle prosequi, because the evidence is not sufficient to convict. Such an abandonment

by the prosecuting attorney is equivalent to a verdict of acquittal. *The United States v. Shoemaker*, 2 M'Lean 114.

2. (*When court may discharge the jury.*) A jury sworn in a criminal case may be discharged by the court, under any sudden and uncontrollable emergency, and such discharge is no bar even in a capital case to another trial. *Ib.*
3. (*New trial in criminal cases.*) It has been held¹ that in a capital case a new trial is prohibited by the constitution, where a verdict of guilty is rendered, as it would place the defendant a second time in jeopardy. With this view I do not concur, but it was taken by a most able and learned judge, and shows great strictness in criminal proceedings. *Per M'Lean j.*, *ib.* 116.
4. (*Election of several counts in the same indictment.*) The court will not compel the prosecuting attorney to elect on which count in the indictment he will try the defendant, where there are different counts, charging offences of different grades of the same class, and connected with the same transaction. *The United States v. Dickinson*, *ib.* 325.
5. (*Conspiracy.*) An indictment for a conspiracy to compass or promote a purpose, not in itself criminal or unlawful, by the use of criminal or unlawful means, must set forth the means intended to be used. *Commonwealth v. Hunt et al.*, 4 Metcalf 111.

An indictment alleged that the defendants, being journeymen boot-makers, unlawfully &c. confederated and formed themselves into a club, and agreed together not to work for any master boot-maker or other person, who should employ any journeyman or other workman who should not be a member of said club, after notice given to such master or other person to discharge such workman: Held, that there was no sufficient averment of any unlawful purpose or means. *Ib.*

DEBTOR AND CREDITOR. (*Effect of release under general assignment on liabilities accruing subsequently.*) A. indorsed promissory notes and bills of exchange for the accommodation of B., and before they fell due B. failed and made an assignment of all his property for the benefit of his creditors: in this assignment A.'s liabilities for B. were set forth, and A. was placed among the

¹ 2 Sumner 19.

preferred creditors: A. and others accepted the assignment, and released all their several debts, dues, claims and demands against B.: B.'s property, which was assigned, was insufficient to pay the preferred creditors in full, and the proceeds thereof were divided among those creditors: Held, that the release discharged B. from any further liability to indemnify A. against the indorsements of said notes and bills. *Pierce et al. v. Parker*, ib. 80.

B. assigned all his property in trust for the payment of his debts, and the securing of his indorsers whose liabilities for him were set forth in a schedule annexed to the deed of assignment. The indorsers of his notes and the holders thereof, with other creditors, accepted the assigned property in full payment and discharge of all claims which they then had, or thereafter might have, on account of all demands, actions, causes of action and moneys mentioned in said schedule; and covenanted not to sue or molest B. on account of the same: Held, that the terms of the instrument were sufficient to release B. from all liability to his indorsers: Held also, that the indorsers of B.'s notes were not released by the holders, whether the notes, at the time of the execution of the release, were outstanding in the hands of parties who did not join in executing it, or were then in the hands of indorsees who did execute it. *Reed v. Tarbell*, ib. 93.

2. (*Application of payments.*) A payment made on account of a running account of long standing, of which the debtor had never been furnished with a copy, or otherwise apprised of the entries contained in it, is not sufficient to warrant the court, so to apply the payment to the debt, as to pronounce the statutory bar removed. It should be left to the jury to say, on account of what indebtedness the payments was made. *Beltshooner v. Yewell*, 11 Gill & Johns. 212.

To revive the items of an open account which are barred by the statute, by a payment in part or payment on account, it is necessary it should appear that the payment was made on those items, or that the debtor with full knowledge of the charges barred by the statute, made the payment recognising their validity. *Id.*

Payments made generally, when there is nothing in the circumstances of the case to show how the debtor expected them to apply, may be applied by the creditor, as he chooses. *Rosseau et al. v. Cull et al.*, 14 Vermont 83.

3. (*Assignment by debtor when void.*) A sale of personal property, raised and kept on a farm by a tenant, is void against his creditors, if it is still kept by him on the farm, notwithstanding the owner of the farm agrees to keep it for the vendee, when such owner is not in actual possession. *Rockwood v. Collamer et al.*, ib. 141.

EQUITY. (*Creditor having different funds compelled to do equity.*) A creditor who looks to two funds may be restrained to the use of one, if sufficient, at the instance of a creditor of one of the funds, or if satisfaction be obtained by the creditor of both funds out of the common fund, equity will give the other creditor a lien on the fund not exhausted. *Findlay's Exrs. v. The Bank of the United States*, 2 M'Lean 44.

2. (*Statement of complainant's title.*) Where a complainant files a bill, claiming for himself and others certain tracts of land, purchased in partnership, to sustain the suit it is enough to show that the land was purchased by the partnership funds, without specifying the amount contributed by each partner. *Pratt v. Oliver et al.*, ib. 266.
3. (*Parties.*) All persons materially interested in the subject matter of the suit must, if within the jurisdiction of the court, be made parties. There are some cases where a trustee may sue, without naming the cestui que trusts, but the cestui que trusts must be named where the object is to divest them of title. If the demand existed on the trust fund before the trust was created, a suit may be sustained against the trustee alone. And where the parties are so numerous as not to be inserted conveniently in the record, suit may be maintained in the names of a part for the whole. *Ib.*
4. (*Lapse of time.*) The lapse of time is open to the defendant as a ground of defence, although by reason of the non-residence of the complainants the statute could have no effect against them at law. *Bowman's Devises et al. v. Wathen et al.*, ib. 396.
5. (*Relief against a judgment at law.*) A court of chancery will not grant relief to a party who has suffered a judgment at law to be rendered against him by default, unless prevented from defending himself at law, by fraud, accident, or the conduct of the opposite party. *Prather v. Prather*, 11 Gill & Johns. 110.
6. (*Marshalling assets.*) The general rule of marshalling assets, is

to apply first, the personal estate—then lands devised to be sold for payment of debts—then lands descended; and *lastly*, estates specifically devised, even though they were generally charged with the payment of debts. *Chase v. Lockerman*, ib. 185.

If specific legacies have been applied to pay specialty debts, the specific legatees are entitled to contribution against the devisees of the realty—and if the general personal estate has been applied to the payment of specialty debts, and the simple contract creditors consequently thrown upon the specific bequests, the specific legatees in that case have a right to contribution from the devisees of the real estate. *Ib.*

EVIDENCE. (*Impeachment of credibility of witness.*) To discredit a witness it is not competent to prove general bad character, disconnected with his veracity. The proper inquiry is, what is the general character of the witness where he resides, for truth. And the witness, under examination, may be asked, from your knowledge of his general character, would you believe him under oath. Particular facts of a criminal nature cannot be proved to discredit the witness: the inquiry must be general. *The United States v. Vansickle*, 2 M'Lean 219.

2. (*Competence of party to a negotiable instrument.*) In an action between the holder and the indorsers, the maker of the note, the defendant having released their costs, is a competent witness to prove that the note, after it was signed by him and passed out of his possession, was altered in a material part. But he is not competent to impeach the note by any facts within his knowledge at the time the note was made. His testimony must be limited to facts subsequently to his agency in the formation and negotiation of the note. *Frazer v. Campbell et al.*, ib. 235.

3. (*Competency of consignee in action for freight.*) The consignee of goods, who has delivered them over without the payment of freight, is a competent witness in a suit by the master of the vessel against the owner of the goods. *Bork v. Norton*, ib. 422.

4. (*Books of original entry.*) Books of accounts are not evidence at common law. But entries made by a clerk, who is deceased, are evidence. The original book, however, must be produced. A copy from it cannot be received. To make the entries evidence, they must have been regularly entered, and the books, upon their

face, must have the appearance of fairness. The rule on which this evidence is admitted, applies to all matters of entries made in a regular course of business by a person before his decease. *Gale v. Norris and Burr*, ib. 469.

A ship-broker's book and his suppletory oath cannot be received in evidence to support a charge for a commission on the sale of a vessel. *Winsor & another v. Dillaway*, 4 Metcalf 221.

5. (*Parol evidence to explain writing.*) Parol evidence is admissible to identify a note which is provided for by an assignment of the maker's property, but which is misdescribed in the schedule annexed to the assignment. *Pierce v. Parker*, ib. 80.

A. and B., being tenants in common of a tract of land of 47 acres and 28 rods, A. conveyed to B. a part thereof, bounding it, in the deed, "north on land this day deeded to A. by B.;" and on the same day, B. conveyed the other part of the same tract to A., bounding it, in the deed, "south on land this day deeded to B. by A.; to contain 24 acres, more or less." Held, that the deeds were not void for uncertainty; that the deed from B. to A. was not to be construed to convey any precise quantity of land; but that there was a latent ambiguity as to the boundary between A. and B., which might be removed by extrinsic evidence. Held also, that evidence that A. and B., two years before said deeds were executed, had agreed to divide said tract, and caused a survey to be made of it, and had made a wall from the east to the west side of it, on the line of division indicated by the survey, and had ever afterwards severally occupied on each side of the wall, was sufficient to prove that the wall was the boundary intended by said deeds. Held further, that parol evidence was not admissible to show, by way of controlling the foregoing evidence, that A. and B. agreed, when the survey was made, to divide the tract into equal parts, and that in consequence of a mistake in the survey, the wall was not made on the true line of equal division. *Crafts v. Hibbard*, ib. 438.

6. (*Depositions—Production of private correspondence.*) When a deposition is taken in another state, under a commission, and the deponent is inquired of respecting letters written by a party to the suit, and is requested to annex such letters or copies thereof to his deposition, he is not bound to do either: The most that can

be required of a deponent in such case, is, to furnish such extracts from letters received by him as relate to the subject of inquiry, upon being paid a reasonable charge for making such extracts. *Amherst Bank v. Conkey*, ib. 459.

7. (*Presumption of continuance of insanity.*) The rule of evidence, that where insanity is proved or admitted at any particular time, it is presumed to continue, does not apply to insanity caused by a violent disease. *Hix v. Whittemore*, ib. 545.
8. (*Declaration of agent.*) The rule arising from the relation of principal and agent is, that the declarations or representations of an agent, made in the course of and accompanying the transaction which is the subject of inquiry, and acting within the scope of his authority, may be proved as part of the *res gesta*. *Franklin Bank of Baltimore v. P., D. & M. Steam Navigation Co.*, 11 Gill & Johns. 28.

But the rule does not extend to declarations, or representations, made *after* the transaction, though in relation to it;—such declarations constituting no part of the *res gesta*, and not being binding on the principal. *Ib.*

9. (*Evidence of what a deceased witness swore on a former trial.*) Where in a trial of a cause, it is necessary and proper to prove what a deceased witness swore on a former trial, between the same parties, where the issue or matter in controversy is the same; it is sufficient for the living witness who is called to testify, to prove that the deceased witness swore to certain *facts*, and he need not prove the precise words employed by such deceased witness. *Garrott v. Johnson*, ib. 173.

10. (*Incompetency of witness from want of religious belief.*) A person who believes that there is no God, is not a competent witness. To prove this it is competent to show his settled and previous declarations on the subject. Though the witness may have been for this reason incompetent, yet if the objection has been removed by a change of views, he should be examined, and whether there has been a change is a question of fact for the county court, and is not matter of error. *Scott v. Hooper*, 14 Vermont 535.

EXECUTION. (*Title of purchaser under execution.*) However irregular a proceeding may be, the title of the purchaser cannot be affected by the irregularity, unless the proceeding was abso-

lutely void. If only voidable, the title must stand. If an execution be issued on a dormant judgment, it is irregular, and the execution may be set aside on motion; but a title under a sale on such execution, is good. *Lessee of Sumner v. Moore*, 2 M'Lean 59.

2. (*Death of defendant.*) Where a levy has been made, the sheriff may go on and sell, though the death of the defendant occur subsequently to the levy. If however the defendant die before the levy, the judgment must be revived. *Ib.*

FERRIES. (*May be separate from the right of soil.*) The part excepted is not conveyed, but remains in the grantor, and needs no words of perpetuity. The ferry right is an incorporeal hereditament. It grows out of the soil, and may be granted the same as a rent or an advowson. In such a case the grantee has a right to use the soil for ferryways, but for no other purpose. And for any obstruction of this right he is entitled to a remedy. *Bowman's devisees & Burnley v. Wathen & others*, *ib.* 376.

FRAUDS, STATUTE OF. (*Collateral undertakings.*) The late decisions in England require an agreement to pay the debt of another, to state in it the consideration. In this country the weight of authority does not coincide with the English rule. Where the guarantor is the holder of a note and his guaranty forms a part of the transfer of it, a consideration sufficiently appears from the nature of the transaction. *How v. Kemball et al.*, *ib.* 103.

2. (*Contract for sale of growing timber.*) A contract for the sale of growing wood and timber, to be cut and removed by the purchaser, is not a contract for the sale of any interest in or concerning lands, &c. within the statute of frauds. *Clafin v. Carpenter*, 4 Metcalf 580.

3. (*Agreement partly in writing, and partly parol—Part performance.*) A paper signed by a party proposing to convey all the property, cannot be connected by parol with another paper not signed, for the purpose of designating the property designed to be conveyed, and thus escape the prohibitions of the statute of frauds. *Moale v. Buchanan*, 11 Gill & Johns. 314.

An agreement to be within the statute of frauds, cannot be partly in writing and partly in parol. It must be entirely in writing, and signed by the parties or their authorized agents. *Ib.*

Parol evidence may however so connect two papers, as to be evidence that they both related to and formed parts of one contract. *Ib.*

An agreement entirely by parol and in part performed, may be specifically executed; part performance taking the case out of the statute of frauds. *Ib.*

So where there was an agreement to convey two lots to trustees for creditors, in consideration of indulgence and extension of credit, void under the statute of frauds, taking possession of the property under the contract, and granting the indulgence, is such a part performance of the agreement, as will induce equity to execute it specifically. *Ib.*

GUARANTY. (*Notice to guarantor of notes of their nonpayment.*)

Where a separate guaranty is given of the payment of certain notes, the guarantor is entitled to reasonable notice of the nonpayment or he will be discharged, unless the parties to the notes were insolvent at the period of their maturity. It is a well established rule that the same degree of strictness in regard to giving notice to a guarantor, is not necessary to charge him as to charge an indorser. It is as necessary however that the guarantor should endeavour to obtain an indemnity from his principal as an indorser; and it is on this ground that a notice is as indispensable in the one case as the other. *Lewis v. Brewster*, 2 M'Lean 21. *Foote et al. v. Brown*, ib. 369.

2. (*Effect of want of notice to guarantor.*) If the parties who ought primarily to have paid the bill or note, were solvent at the time the same became due, and for some time afterwards and only subsequently became insolvent before notice, an inference of actual damages from the want of notice to the party guaranteeing or otherwise collaterally liable, will prevail, until rebutted by actual proof that if notice had been given payment would not have been obtained. *Ib.*
3. (*Averment of notice in the declaration.*) The notice to the guarantor must be averred in the declaration. And where there was an averment of notice more than seven months after the obligation matured, it was held bad on demurrer. Where there is an excuse for want of notice, it should be stated in the declaration. *Ib.*

HUSBAND AND WIFE. (*Divorce a mensa et thoro.*) A wife

who is divorced from bed and board, and lives apart from her husband, may be sued, as well as sue, as a *feme sole*. *Pierce v. Burnham*, 4 Metcalf 303.

2. (*Desertion by husband*.) The desertion of a wife by her husband, which will enable her to sue and render her liable to be sued, as a *feme sole*, must be an absolute and complete desertion, by his continued absence from the commonwealth, and a voluntary separation from and abandonment of his wife, with an intent to renounce, *de facto*, the marital relation, and leave her to act as a *feme sole*. *Gregory v. Pierce*, ib. 478.
3. (*Assignment of wife's chose in action by husband in trust for her separate use, good against his creditors*.) When a wife's distributive share of her father's estate is in the hands of her former guardian, an assignment thereof by the husband, in trust for her separate use during her life, and for the use of her children after her decease, is not fraudulent as to his creditors, and they cannot reach such assigned property by the trustee process. *Gasett v. Groat*, ib. 486.
4. (*Wife's equity to a settlement*.) Where the husband seeks by a bill in chancery to recover a sum or sums of money due to his wife, the equity of the wife to a settlement is unquestionable, and in such cases it is the invariable practice to include a provision for the issue of the marriage. *Groverman and wife v. Diefenderfer*, 11 Gill & Johns. 15.
5. (*Conveyance by husband in fraud of wife*.) A conveyance by the husband, shortly before his death, of all his property, both real and personal, to his children, without any *valuable* consideration, and with *the intent* to defeat his wife of her dower and her share of the personal estate, securing at the same time to himself the possession, use and control of it during his life, is fraudulent against the claims of the wife, and will be set aside. *Thayer v. Thayer et al.* 14 Vermont 107.

Though the wife separate from the husband by reason of family discord, yet such separation is no forfeiture of her right of dower and her share of the personal estate, though she may have no justifiable cause of separation. *Ib.*

6. (*Lands of the wife liable in judgment against husband and wife for debt dum sola*.) The lands of a married woman may be set

off, during coverture, in satisfaction of an execution issued upon a judgment against her and her husband, founded on a contract executed by her previously to her marriage. *Fox v. Hatch*, ib. 340.

INTEREST. (*On loss in policy of insurance.*) A contract in a policy of insurance, to pay the loss on a certain day after proof thereof, is not a contract to pay interest after that day if the loss be not then paid. *Oriental Bank v. Tremont Ins. Co.*, 4 Metcalf 1.

INTESTACY. (*Representation—Brothers' and sisters' children.*) The act of 1820, ch. 191, sec. 4, declares that there shall be no representation among collaterals, after brothers' and sisters' children. The judicial interpretation given to that language, which is borrowed from the statute of distributions of 22 Car. 2, ch. 10, is, that brothers' and sisters' children, mean the children of the brothers and sisters of the intestate, and that there shall be no representation among collaterals after the children of the brothers and sisters of the intestate, who died seized. *Porter v. Askev*, 11 Gill & Johns. 346.

L. died seized, intestate and without issue; she left A. an aunt, and children of uncles and aunts. Held, that under the act of 1820, ch. 191, sec. 4, A. was entitled to the whole estate. *Ib.*

JUDGMENTS. (*Conclusiveness of judgment of one state in the courts of another.*) Under the constitution and laws of the United States, a judgment obtained in one state has the same effect in every other state. It is conclusive of the subject matter of controversy, and no plea can be filed which contradicts the record. *Jacquette v. Hugunon*, 2 M'Lean 129.

2. (*What may be pleaded in action on a judgment of a sister state.*) The statute of limitations of the state where the suit is brought may be pleaded, also a release or payment, but the plea of nil debet which controverts the judgment, cannot be pleaded. The plea of nul tiel record is the proper and the only plea that brings before the court the validity of the record and the description of it as set forth in the declaration. *Ib.*

3. (*Effect of judgment of a sister state—Judgment in attachment.*) A judgment of a court in another state is not entitled to full faith and credit under the constitution and laws of the United

States, unless the court had jurisdiction of the parties as well as of the cause. *Gleason v. Dodd, Admr.*, 4 Metcalf 333.

In an action on a judgment rendered in another state, the defendant may impeach such judgment by proof that he had no legal notice of the suit, and never appeared therein and submitted to the jurisdiction of the court, either in person or by authorized attorney. *Ib.*

The record of a judgment, rendered in another state against the administrator of the original plaintiff in the suit, set forth that the death of such plaintiff was suggested, and that "D., administrator, then came in," and that "the plaintiff, administrator, as aforesaid," afterwards became nonsuit, whereupon judgment was rendered against him for costs. In an action on this judgment, brought in this state against the administrator, it was held that he might prove, in defence, that he never appeared in the original suit, nor authorized any one to appear for him and prosecute the same. *Ib.*

The authority of an attorney to commence and prosecute a suit is revoked by the death of the constituent, and he has no authority, without a new retainer, to appear in the suit for the constituent's executor or administrator. *Ib.*

In an action in this state on a judgment of a court in another state, rendered for costs against a plaintiff in a suit commenced there, he may defend successfully by showing that he gave no authority to institute such suit, and had no knowledge thereof before judgment was rendered therein. *Watson v. New England Bank*, ib. 343.

4. (*Form of action upon judgments of sister state.*) An action of assumpsit will not lie upon the judgment of another of the American states. The declaration must be in debt, counting upon the judgment as a record. *Boston India Rubber Factory v. Hoit*, 14 Vermont 92.

LEASE. (*Lease disclaimed by tenant is not binding on the landlord.*) A parol lease under which no act has been done by the lessee, who has constantly repudiated it, but who has enjoyed the premises for the term, may be treated by the lessor as a subsisting lease, and he may seek his remedy upon it; or he may bring his action and recover the rent on a count for use and occupation. *Scott v. Husham*, 2 M'Lean 180.

2. (*Operation of surrender.*) A lessee who erects on the demised premises, a building, which he has a right to remove, renounces that right by surrendering his leasehold interest to the lessor, without reservation; and the right is not revived by his subsequently taking another lease of the same premises, from the same lessor. *Shepard v. Spaulding*, 4 Metcalf 416.

Where a lessee for years conveys his leasehold interest to his lessor, who is owner of the fee, by an instrument in the form of the lease which he received from him, the legal operation of such instrument is a surrender of the lease, and a merger of the term. *Ib.*

3. (*Where rent is to be part of the produce.*) Where one person, in terms, leases a portion of an entire farm, the rent to be paid in a specified proportion of the product of the whole farm, the remaining portion being the property of the lessee, and the lessee expressly stipulating to deliver such rent at a time and place named, he must sever that portion of the products which constitutes the rent, from the mass, or he will be liable upon his contract for the entire sum. *Admr. of Nye v. Estate of Maxwell*, 14 Vermont 14.

If one let a farm to another, to be paid for the use of it in one half the crops, to be delivered on the farm, the lessor is only a tenant in common of the crops at most, until his portion is severed. *Quære*: Whether he be strictly a tenant in common even? *Hurd v. Darling et al.*, *ib.* 214.

4. (*Lease of chattels.*) Where the owner of cattle leased them, with a farm, for four years, under an agreement that at the expiration of the four years, the lessee might either return the cattle or pay a stipulated price for them, and the lessee sold the cattle before the four years had expired, it was held, that such sale determined the lessor's right of possession, and that the owner might maintain trover for the cattle against both seller and purchaser. *Grant v. King et al.*, *ib.* 367.

LEGACIES. (*Abatement of.*) A testator, after giving sundry legacies, specific and pecuniary, and making a residuary legatee, directed by his will, that five per cent. yearly interest, from the time of his death, should be paid on all the pecuniary legacies, except that given to the residuary legatee, until the property, from which the principal of the legacies was to be paid, should be con-

verted into money: The testator afterwards made a codicil, in which he expressly confirmed the will, in all respects except so far as it should be revoked or altered by the codicil, and gave an additional pecuniary legacy, without mention of interest thereon, and directed that it should be paid before anything should be paid to the residuary legatee mentioned in the will: The assets of the testator, when converted into money, were not sufficient, after paying the specific legacies, to pay the pecuniary legacies in full, with interest. Held, that the legacy given by the codicil was not to be postponed to the other pecuniary legacies, but that all of them were to be paid pro rata, with five per cent. yearly interest thereon from the testator's death. *Washburn v. Sewall et al.*, 4 Metcalf 63.

2. (*What constitutes a charge on real estate.*) A testator devised all his real estate to his sons, by their paying to each of his daughters a certain sum "out of the estate." Held, that the sons took an absolute estate in fee, charged with the legacies to the daughters, and not an estate upon condition; and that the daughters had a remedy, for nonpayment of their legacies, not only against the sons, but also against any terre-tenants who purchased the estate with notice of the charge. *Tuft & wife v. Morae et al.*, ib. 523.

LIMITATIONS. (*The sovereign not barred.*) The United States suing in a state court are within the exceptions of the act of limitations, in favour of the sovereignty of the state. The former government being possessed of a part of that sovereignty. *Swearingen v. The United States*, 11 Gill & Johns. 373.

2. (*Promise to revive a debt barred.*) In an action on a promissory note, where the maker, after, the statute of limitations had run, said it was a just debt and ought to have been paid but he became poor and could not pay it, but that he would pay one-half of it at a future period if the payee would give up the note: Held, that such acknowledgment did not take the case out of the statute of limitations. *Cross v. Conner*, 14 Vermont 394.

MASTER AND SERVANT. (*Liability of master to servants.*)

Where a master uses due diligence in the selection of competent and trusty servants, and furnishes them with suitable means to perform the service in which he employs them, he is not answerable to one of them, for an injury received by him in consequence

of the carelessness of another while both are engaged in the same service. *Farwell v. Boston and Worcester Rail Road Corporation*, 4 Metcalf 49.

MORTGAGE. (*Rights of assignee.*) A mortgage assigned in payment of a debt is not held by the assignee subject to the claims of the creditors of the assignor. Although there may be an equitable lien on the mortgaged premises, yet the assignee having no notice of it is not affected by it. Generally the mortgagor may claim the same rights against the assignee of a mortgage as against the mortgagee. If the mortgagor have a set-off or mutual credit against the mortgagee, it is not affected by the assignment. A payment made to the mortgagee, after the assignment but before the mortgagor has notice of it, is good against the assignee. *Hubbard v. Turner*, 2 M'Lean, 519.

2. (*Fixtures as between mortgagor and mortgagee.*) Fixtures, and additions in the nature of fixtures, which are placed in a building by a mortgagor, after he has mortgaged it, become part of the realty, as between him and the mortgagee, and cannot be removed or otherwise disposed of by him while the mortgage is in force. *Winslow et al. v. Merchants' Ins. Co.*, 4 Metcalf 306.

A steam engine, boilers, &c., and machinery adapted to be moved by such engine, by means of connecting bands and other gearing, which are placed in a building designed for the manufacture of steam engines and other heavy iron work, are fixtures, or in the nature of fixtures. *Ib.*

3. (*When a mortgage is real and when personal estate.*) A mortgage interest before foreclosure, is considered in equity as a chattel interest, and as such belongs to the executor, and though the technical fee may descend to the heir, he takes it in trust for the personal representative. *Chase v. Lockerman*, 11 Gill & Johns. 186.

But as between the real and personal representative, the mortgagee may by a manifest declaration of his intent, convert the mortgage as well as any other part of his personal estate, into land, and make it pass accordingly. *Ib.*

PARTNERSHIP. (*Admissions of one partner after dissolution.*)

A letter of one of the defendants who were partners, admitting the account on which the action was brought, is not admissible to

bind the firm, the letter having been written after the dissolution. *Bispham v. Patterson et al.*, 2 M'Lean 87.

2. (*Adoption by firm of prior individual liability.*) Goods were purchased by one of the defendants, for which a promissory note was given; afterwards he entered into partnership with the other defendant, and by the consent of both partners and the holder of the note, the words "and company" were added to make the note stand against the firm: Held that the note was binding on the company. *Crum v. Abbott et al.*, ib. 233.
3. (*How far partnership may be proved by declarations.*) If an individual hold himself out to the world as a partner in a concern, he is liable as such, though he have no interest in it. But this holding out must be such as to justify an inference that the creditor had knowledge of it. Or the representation of partnership must be made to him. A declaration by an individual that he was a partner, to some four or five individuals, of which the creditor, when he trusted the firm, could have had no knowledge, will not constitute a liability. To rebut such declarations, as conducing to establish a partnership in fact, the contract made between the parties, though by parol, may be proved. *Benedict et al. v. Administrators of Davis*, ib. 347.

Where it was attempted to be proved that a partnership existed between two persons as innkeepers, &c., by the admission of one of the alleged partners, and by the course and circumstances of their business and their joint use of the property connected with the tavern house, it was held that an assignment of the tavern furniture and accounts, by the other alleged partner, to a third person, for the payment of the assignor's debts, might be given in evidence as tending to rebut the testimony on the part of the plaintiff, and to show that the alleged partners had not been in the joint receipt of the income of the tavern. *Callender v. Sweat et al.*, 14 Vermont 160.

4. (*Notice of dissolution.*) There are two modes of giving notice of the dissolution of a copartnership, which will discharge an outgoing partner. One is express notice, by circular or otherwise, to those with whom the firm has had dealings. The other by publication in some newspaper of general circulation. This latter notice is conclusive on those who had not had dealings with the

firm. And as to those who have had dealings with the firm, such a publication would be received as evidence to the jury, who must determine, from all the circumstances of the case, whether the party had notice. *Skurlds v. Tilson and Pitkin*, 2 M'Lean 458.

5. (*Agreement to discharge one of several partners.*) A., of London, gave a letter of credit to B. & C., of Boston, who thereupon drew bills on A., which he accepted and paid: B. had other accounts with A., in which C. had no concern: C. had funds in the hands of B., and requested B. to remit to A. and close the account of B. & C.: B. afterwards made a remittance to A. and advised him, by letter, of other forthcoming remittances, and requested him to apply the sum, which was actually remitted, to B.'s account generally, and place the bills which A. had accepted and paid for B. & C. to B.'s debit: This letter was shown to C. before it was forwarded to A.: A. replied, that he had received B.'s letter, and "noted the contents:" This letter was also shown to C.: Before this letter was received, B. failed, being largely indebted to C.; and in about seventy days after the letter was written, A. suspended payment, not having, in his correspondence, again alluded to B.'s request to debit him with the bills accepted and paid for B. & C.: About four and a half months after said letter was written, A. forwarded his account against B. & C. and it was put in suit. Held, that A. had not, by the terms of his letter to B., agreed to discharge C. and look for payment to B. alone; that there was no consideration for such agreement, if it had been made; and that A. was entitled to recover of B. & C. *Wildes v. Fessenden*, 4 Metcalf 12.
6. (*Real estate held by firm.*) Real estate, purchased by partners, for the partnership business and with the partnership funds, though conveyed to them by such a deed as, in case of other parties, would make them tenants in common, is considered, in equity, as part of the partnership stock, and is to be applied, if necessary, towards payment of the partnership debts. Though such estate is considered, at law, as the several property of the partners, yet it is held subject to a trust arising by implication of law, by which it is liable to be sold and the proceeds brought into the partnership fund, so far as is necessary to pay the debts of the firm; and neither the widow nor the heirs of a deceased partner can claim any beneficial interest in such estate, until the claims of the creditors

of the firm are first satisfied. *Burnside et al. v. Merrick et al.*, ib. 537.

7. (*Sealed instruments executed by one partner.*) A sealed contract executed by one of several partners in the name of the firm, binds the firm, if the other partners assent to or ratify such contract; and their assent or ratification may be by parol authority previously given, or by acts or parol admissions, or by acts without any parol admissions afterwards; provided the acts be such as would not have been done if such assent had not been given. *Swan v. Stedman et al.*, ib. 548.

8. (*Judgment against one partner is a merger even against a dormant partner.*) Where the ostensible partner had given notes in the partnership name, for merchandise purchased for the uses of the partnership, upon which the payee in ignorance of the partnership sued and recovered judgment against the former alone, it was held, in an action afterwards brought against the dormant partner, that the liability of the latter upon the notes, was extinguished by the judgment. *Moale v. Hollins*, 11 Gill & Johns. 11.

PATENT. (*Sale of patent right.*) Where A. sells to B. the right of making and vending a stove, for which he claims a patent, (which patent is not yet obtained,) and A. takes out a patent which is void, because it claims more than A. has invented, and A. subsequently takes out a second good patent: Held, that A. has a right of action against B. for an account of sales made prior to the second patent. *Stanley v. Whipple*, 2 M'Lean 35.

2. (*Second patent in lieu of a void patent.*) Under the thirteenth section of the patent law, passed July 4th, 1836, the second patent has relation back to the emanation of the first patent, as fully for every legal purpose, as to causes subsequently accruing, as if the second patent had been issued at the date of the first one. *Ib.*

3. (*Utility of patent.*) The advertisements and admissions of the assignee of the patent as to its value and utility, are admissible against him. *Ib.*

4. (*Patents for improvements in patented machines.*) A patent for an improvement in a machine which had been previously patented to another person, cannot protect the right of the patentee, unless the improvement be substantially different in principle from the original invention. An alteration merely formal or a slight im-

provement, will give no right. The jury will determine from the models exhibited and the other evidence, whether there is a difference in principle between the two machines. That is called principle in a machine, which applies, modifies, or combines mechanical powers to produce a certain result. *Smith v. Pearce et al.*, ib. 176.

PLEADING. (*Plaintiff's title must be set out in narr.—What will be cured by verdict.*) Where an action is brought by a patentee of an invention against his vendee on his contract of sale, the declaration must aver that a patent had been obtained or that the exclusive right was vested in the plaintiff; it will not be sufficient to aver that he claimed a patent or exclusive right. An omission of such averment, however, is aided by verdict, where the declaration stated that he claimed a patent, and that the defendant possessed and enjoyed the right under the contract. The court must presume that on the trial the exclusive right was proved to be in the plaintiff. *Stanley v. Whipple*, ib. 35.

2. (*Variance.*) A note dated at Cincinnati, and described in the declaration as dated at Cincinnati, in the state of Ohio, to wit, &c., is admissible in evidence; especially where the fact is proved or admitted that Cincinnati is in the state of Ohio. The contract being transitory, and the place where it was made having no effect upon its construction, the words *in the state of Ohio* may be rejected as surplusage, and need not be proved. *Drake v. Fisher*, ib. 69.

3. (*Upon statutes.*) In pleading upon statutes, where there is an exception in the enacting clause, the plaintiff must show that the defendant is not within the exception; but if there be an exception in a subsequent clause, that is matter of defence. *Walker v. Johnson*, ib. 96.

4. (*Joint trespasses.*) The rule is well established that there may be several judgments against different individuals for the same trespass, but only one satisfaction. One joint trespasser cannot plead in bar a prior judgment against another for the same trespass; but to be a good bar the plea must state that the prior judgment has been satisfied, or at least that the plaintiff has elected to take the judgment by issuing execution on it. *Matthews v. Meneager*, ib. 149.

5. (*Judgment against one of several joint debtors.*) Where judgment is taken against one, in a suit against several partners, the cause of action is merged, and such judgment may be pleaded in bar to a subsequent action against one or all the debtors. *Woodworth v. Spaffords et al*, ib. 168.
 6. (*Infancy when pleadable.*) Infancy is a good bar to an action founded upon a false and fraudulent warranty upon the sale of a horse. *West v. Moore*, 14 Vermont 447.
- POST-OFFICE. (*Non-residence of postmaster.*) A postmaster, until the action of the postmaster-general, does not vacate his office by remaining out of the neighbourhood of the office. If he keep the office by an assistant, he is still responsible to the department and to individuals. *The United States v. Pearce*, 2 M'Lean 14.
2. (*Detaining letters.*) The 21st section of the post-office law, which prescribes a punishment for the detention of a letter or packet, refers to a letter or packet detained, before it reaches the place of destination. *Ib.*
 3. (*Stealing letters.*) The stealing or taking a letter, as expressed in the same law in the 22d section, means a clandestine taking—not a taking through mistake or with an innocent intent. It must be a taking with a criminal intent. *Ib.*
 4. (*Offences under the post-office law.*) Offences under the post-office law are riot felonies. They are misdemeanors; and, in such cases, less nicety in the form is required, than in indictments for felonies in England. It is not necessary to give a particular description of a letter charged to have been secreted and embezzled by a postmaster. Nor to describe the bank notes, particularly, inclosed in the letter. But if either the letter or the notes be described in the indictment, they must be proved as laid. It is enough to show that the letter came into the hands of the postmaster, in the words of the statute, without showing where it was mailed, and on what route it was conveyed. *The United States v. Lancaster*, ib. 431.
- POWER. (*Power to sell real estate.*) A letter of attorney, empowering the attorney to sell any of the constituent's real estate, authorizes him to sell real estate which the constituent acquires after the execution of such letter. *Fay et al. v. Winchester*, 4 Metcalf 513.

2. (*Devise that lands be sold, in whom the power vests.*) P. devised as follows—"I wish all my debts to be as speedily paid as possible, for which purpose I desire that the tract of land on which D. lives, together with all my personal property thereon, may be sold, and applied to that purpose; and in aid of that, so much of my city property as may be necessary to effect that object," and appointed S., G., and L. executors of his will. Upon the construction of this will, it was held, that the executors of P., whose duty it was to pay the debts of the testator with the proceeds of sale, had the right at common law to make the sale, and competent power to pass the legal title under the will to the purchaser, upon payment of the purchase money; that the power to sell in this case, was given to the executors by implication, and that the trust to apply the proceeds to the payment of debts, would continue the power in the surviving executor. *Magruder v. Peter*, 11 Gill & Johns. 217.

PRESUMPTION. (*Of payment from lapse of time.*) After the lapse of twenty years, a presumption of payment of a bond or note arises, and under peculiar circumstances, it may arise on a shorter time. This presumption may be rebutted by circumstances. *Denniston v. M'Keen*, 2 M'Lean 253.

PRINCIPAL AND SURETY. (*The relation merged as to creditor by judgment.*) A judgment against an accommodation indorser who is considered as a surety and also against the drawer, merges the relation of principal and surety. In such a case the only remedy is for the surety to pay the judgment, and ask to be substituted to all the rights of the principal. *Findlay's exr. v. The Bank of the United States*, ib. 44.

2. (*Acceptance by creditor of principal's property in payment.*) A debtor has a right without the assent of his surety, to convey his property at an agreed price to the creditor in payment of the debt; and a court of equity will not set aside such conveyance at the instance of the surety, unless there has been fraud. *Ib.*

3. (*Time given to principal.*) The surety has a right to pay the note and be substituted to all the rights of the holder, and any act of his, such as giving time to the principal, which suspends this recourse by the surety, releases him. *Fuller v. Milford*, ib. 74.

4. (*Remedy of surety.*) In some cases, independently of any statu-

tory provision which exists in Indiana, the surety by a bill in chancery may compel the creditor to use due diligence. *Ib.*

5. (*Time given to principal, must be by a binding agreement, and such as debtor could not have obtained without it.*) Time given to the principal, at the instance of the surety or with his consent, affords no ground for his release. And without such instance or consent, the giving of time must be upon sufficient consideration. If the principal confess judgment at the first term, with stay of execution until the second, and it appears that in the ordinary course of the business of the court, a judgment could not have been obtained before the second term, no time is given which affects the liability of the surety. *Suydam & Co. v. Vance*, ib. 99.

6. (*Notice by surety to creditor to sue.*) The surety by giving notice to the creditor, and requesting him to sue the principal debtor, who is in failing circumstances, does not release himself, though the principal should become insolvent. The relief of the surety, under such circumstances, is in equity. *Executors of Dennis v. Rider et al.*, ib. 451.

7. (*Subrogation.*) The surety, on the payment of the debt, is entitled to be substituted to all the rights of the creditor. This does not mean that the original obligation, which is discharged by the payment, shall be assigned to the surety; but mortgages, &c. *Ib.*

A. guarantied payment of notes and bills of exchange which a bank might discount for B. during one year, to the amount of \$3000 only in the whole: The bank discounted ten notes for B., at different times during the year, amounting in the whole to \$3605, which notes were not paid by the makers or indorsers; and notice of nonpayment was given to A., as the notes severally fell due. In a suit by the bank against A. on his guaranty, it was held that he was liable, not for the gross sum of \$3000, but for a sum not exceeding that amount on the notes discounted, and also for interest on the several notes, after they fell due and notice of nonpayment was given him: Held also, that A., on paying the notes to said amount, and interest, would be entitled to have them delivered to him for his use and benefit; and that, as the first eight notes amounted to \$2782.29, and the ninth note was for \$460, the bank would be trustee of A. in the sum of \$217.71, part of said note. *Washington Bank v. Skurtleff*, 4 Metcalf 30.

8. (*Application of payments by debtor as against sureties.*) The general doctrine as to the application of payments, is, that if the debtor fail to apply them, the government may do so. If both fail, the law will make the application as the principles of justice shall require. Where different sets of sureties are concerned, this rule does not govern. Sureties are only bound, on a receiver of public moneys' bond, that he shall pay over all moneys received, after the execution of the bond. They are not bound for any previous defalcation. And the government cannot bind them, by the exercise of any supposed power, to make application of the payments made. If the sureties are at all responsible, they must be made so by strict law. As, between different sureties, the court will apply the payments so as to avoid injustice. And this they can do from the face of the transcript. Where the payments exceed the receipts in any one quarter, the excess shall be applied to the payment of the previous quarter, though such quarter be prior to the date of the bond. Where a general payment has been made some years after expiration of the bond, the payment must be applied, as stated on the transcript, to discharge, pro tanto, the general balance. *United States v. Linn et al.*, 2 M'Lean 501.

RIVERS. (*Riparian property.*) The rights of a proprietor, bounded by a navigable river, extend to high-water mark; if the river be unnavigable, to the middle of the stream. By the common law, rivers are only navigable as high as the tide ebbs and flows; this not so in this country. *Bowman's devisees et al. v. Wathen et al.*, ib. 376.

2. (*Right of the state to the soil.*) The state has the right to grant the soil covered by navigable waters, subject to the public or common right of fishing and navigation. *Wilson v. Inloes*, 11 Gill & Johns. 351.

SHIPPING. (*Freight.*) Where a vessel is unable to reach the destined port, and the owner of the cargo receives it at an intermediate port, freight, pro rata itineris, may be recovered. The master, who is driven into an intermediate port by stress of weather, and his vessel is unable to proceed, is bound to repair his vessel in convenient time, or procure another vessel to convey the goods. And if he fail in this, he is not entitled to freight. Where the

owner of the cargo is the cause why it is not transported to the port designated, full freight may be demanded. A permanent embargo excuses the master from the performance of his contract. If the obstruction be temporary, it suspends it. A contract for the transportation of goods on our lakes may not, in every respect, be subject to the maritime rule which applies to the high seas. If there be an obstruction on the lake, a land conveyance may be resorted to. *Bork v. Norton*, 2 M'Lean 422.

TENANTS IN COMMON. (*Where one tenant in common may maintain trover against his companion.*) One tenant in common cannot maintain trover against his co-tenant of the same chattel, for any act less than the destruction of his interest therein. *Hurd v. Darling et al.*, 14 Vermont 214.

TRUSTEES. (*Purchase by trustee of trust estate—Conversion of fund by trustee.*) It is a well established principle in equity, that the act of a trustee shall not prejudice his cestui que trust. If a trustee purchase the estate of his principal, the sale as a matter of course is set aside, unless ratified. If a trustee purchase land with the trust fund, and take the conveyance in his own name, in equity the land is held as a resulting trust. Wherever the trust fund is converted into another species of property, if its identity can be traced, it is liable in its new form to the cestui que trust. In such a case, the cestui que trust may exercise his option either to take the property or pursue some other remedy. *Piatt v. Oliver et al.*, 2 M'Lean 269.

2. (*Statute of limitations—Lapse of time.*) The statute of limitations does not run against an established trust, nor will lapse of time, except under extraordinary circumstances, have any operation. *Ib.*

3. (*Sales by trustees.*) The court will not set aside a sale, in all other respects unexceptionable, for inadequacy of price, unless so grossly inadequate as to indicate a want of reasonable judgment and discretion in the trustee. *Glenn v. Clapp*, 11 Gill & Johns. 2.

But if any other just cause appears to doubt the propriety of the sale, inadequacy of price would be a consideration very proper to be viewed in connexion with it. *Ib.*

UNITED STATES. (*Oath under act of congress may be administered by a state officer.*) Where an act of congress requires an

oath to be administered, such oath under the usage of the proper department of the government, may be administered by a state officer having power to administer oaths. *The United States v. Winchester*, 2 M'Lean 185.

2. (*Judgment against debtors of the United States.*) The act of March 3d, 1797, which provides that judgment shall be given at the return term against debtors of the United States, on motion, is limited to cases in which the principal debtor is party to the action. *The United States v. Lyon et al.*, ib. 249.
3. (*Sales of public lands.*) On a sale of public lands, it is not unlawful for individuals to associate together, to purchase for their joint interest where there is no fraud. *Piatt v. Oliver et al.*, ib. 267.
4. (*Seizures under the revenue laws.*) It is the duty of an officer of the customs, on making a seizure of goods for having been imported in violation of the revenue laws, to institute proceedings in rem in the district court. The district court has exclusive jurisdiction of forfeitures. Whether the seizure has been rightful or tortious, cannot be ascertained until the matter has been adjudged by that court. If the person making the seizure refuse to proceed in the district court, on application to the court by the owner, he will be compelled to do so, or return the goods. The pendency of the proceedings in rem may be pleaded in abatement, to an action of trespass against the officer. *Hall v. Warren et al.*, ib. 332.

VENDOR AND VENDEE. (*When vendee may disaffirm the contract.*) A court of equity will not decree a specific performance of a contract, at the instance of the vendor, where he has been guilty of a gross negligence, and the property has greatly deteriorated in value. The consideration of the purchase having been paid to the vendee, in case of his death, his representatives are bound to use, at least, reasonable diligence in executing a conveyance. Where the vendor has been so negligent as to have no claim on a court of equity, for a specific performance, the vendee may disaffirm the contract, and recover back the money paid, in an action for money had and received. *Cooper v. Brown et al.*, ib. 495.

2. (*Action for purchase money.*) The consideration acknowledged

to have been received on the face of a deed of conveyance, does not estop the grantor from showing, in an action for the purchase money, that the consideration has not been paid. *Taggart v. Stanbery*, ib. 548.

3. (*Specific execution in equity*.) Where a vendee asks the specific execution of a contract for the sale of land, the vendor, having agreed that the deed should be made by him before the payment of the consideration, has no right to require the money to be brought into court. Nor has he a right to have the money brought into court when he is in default. Except, under peculiar circumstances, the court will not compel a vendee to accept a deed executed by an attorney. *Johnson et al. v. Sukeley*, ib. 562.
4. (*Representation or sale of chattels*.) Though a representation made by a vendor, respecting goods sold by him, be not true in fact, yet if he believe it to be true, it is not a ground of action by the vendee against him for fraud in the sale. *Aliter*, if he make an untrue representation, as of his own knowledge, not knowing whether it is true or false. *Stone v. Denny*, 4 Metcalf 151.

WATER COURSE. (*Right of proprietor of soil to divert it*.)

The proprietor of land through which a stream runs, may obstruct the natural channel, and divert it into any portion of his land, if the water be returned into the former channel before it passes upon the land of another. *Norton v. Valentine*, 14 Vermont 239.

The owner of the land below can maintain no action for any such obstruction or diversion until he is injured thereby, and, until that time, no prescription runs in favour of the continuance of such obstruction. *Id.*

But if, in such case, the new channel be obstructed so as wholly to divert the water from the land below, the proprietor below may maintain an action for such obstruction of the new channel, and that against the grantee of the owner of the land, at the time of the original diversion, and without any request to remove the original obstruction. *Id.*

It would seem that one who cuts a canal through his own land, and erects mills, and diverts a portion of a stream from its accustomed channel upon the land of another, and is suffered to do this by the proprietor below for fifteen years, thereby acquires the right to do it. *Id.*

WILL. (*Construction of—Executory devise.*) H. devised the income, rents, and profits of his estate to his wife, during the minority of his children, provided she should not marry again, and on no other condition; but if she should marry, then his will was that she should have, in lieu of the aforesaid income, \$100 a year during her life, to be paid by his executors from the income of his estate, provided she should accept the same in lieu of dower: he further directed by his will, that as his children should arrive at full age, they should each receive, from the income of his estate, \$100 annually, to be paid by his executors, if said income would, in their opinion, admit thereof without injuring his wife and minor children. Then followed this clause in the will: "It is understood, that during the time my wife enjoys the whole income of my said estate, she support and educate my children out of said income: and further, that if by intermarriage she shall vacate her claim to the whole of said income, and become entitled, in lieu thereof, to an annuity of \$100 for life, then the residue of the income of my said estate, during the minority of my children, shall be appropriated to their support and education, as my executor shall direct." The last devising clause was thus: "I further will and order, that upon the death of my wife, and all my children or the survivors of them attaining the age of 21 years, or the heirs of such of them as may de cease, leaving issue, all my estate be divided between my said children and their heirs, agreeably to the laws of this commonwealth respecting the division of the estates of persons dying intestate"—with a limitation over to the testator's nephews, if his children, after the death of the widow, should all die without issue.

The executors appointed by H. declined the trust, and letters of administration were granted, with the will annexed: his widow refused to accept the provisions of the will, and claimed and took her dower. During her life, the son and daughter of H. (his only children, and who were minors when he died,) after they were 21 years of age, made partition of all the real estate which was not set off to the widow as dower, and occupied it in severalty: the son also made a warranty deed to A., of a moiety of the reversion of the estate assigned as dower: the son and daughter both died, while the widow was alive, and the son left minor children, one of

whom brought a writ of entry, after the widow's death, against A.'s grantee, and claimed title, under the will of H., to the estate thus conveyed to A.

Held, that the demandant was entitled to recover; that an estate for years was given to the widow, which never took effect, because she refused to take it, and claimed her dower; that the will gave to the children neither a vested nor a contingent remainder; but that, on the death of the widow, the whole estate first vested in the grandchildren, who took it by way of executory devise. *Holm v. Lois*, 4 Metcalf 190.

2. (*Construction—When children named in a bequest will take per stirpes.*) P. J. F., who died in the year 1839, by his will, executed in 1836, after several charitable bequests, divided the residuum of his estate as follows:

"The residue of my estate, real and personal, to be equally divided between the children of my sister, Ann Latimer, and their heirs forever, and the children of my sister Penelope Beall, and their heirs forever."

P. B., one of the sisters, survived the testator, A. L. being dead; the latter had seven children, the former four.

The orphan's court of Charles county directed that the personal estate of the testator should be divided among the legatees, *per stirpes*, giving half to the children of each sister, and this court, upon appeal, affirmed the decree. *Alder et al. v. Beall et al.*, 11 Gill & Johns. 123.

CRITICAL NOTICES.

- 1.—*A Treatise on the Practice of the Court of Chancery, with an Appendix of Forms and Precedents of Costs adapted to the last new orders.* By JONAS SIDNEY SMITH, of the Six Clerk's Office. Second American, from the second revised and enlarged London edition: with Notes and References to the American and late English Cases, by DAVID GRAHAM JR., Counsellor at Law. 2 vols. Philadelphia: T. & J. W. Johnson, Law Booksellers, No. 5 Minor Street. 1842.

THE subject of chancery practice is becoming every day more important and practical in America. The time is not very far distant when the value of separate equity courts and jurisdiction will be appreciated, and such courts introduced into every state. As society advances, and its transactions become more complex and varied, the inconvenience of the administration of equity principles in courts of common law, and with common law forms, or even of the separate administration of law and equity by the same courts, will be apparent to all. We take the liberty of introducing here in connexion with this subject, a condensed and elaborate view of the various systems of equity in the different states, being a note to 4 Kent's Commentaries, p. 163.

"In New Jersey, and in Mississippi, the jurisdiction and proceedings in chancery are ably digested by statute law; *Elmer's Digest. Revised code of Mississippi*, 1824, and it is worthy of remark, that in New Jersey in particular, there is less innovation upon the common and statute law of the land, as they existed at the revolution,

than in any other state. This contributes to render their system of jurisprudence very intelligible, familiar, and attractive to persons educated in the school of the common law. The statute law of Mississippi, under the revised code of 1824, is of the same character, and resembles the statute law of New York prior to the memorable revision in 1830. In Delaware, South Carolina, and Mississippi, equity powers reside in, and are exercised by, distinct and independent tribunals, upon the English model. This was also the case in New York until 1823, but now the exclusive jurisdiction in equity is withdrawn from the chancellor, and equity powers are partially vested in the circuit judges as vice-chancellors, and they exercise, in distinct capacities, a mixed jurisdiction of law and equity. The same mixed jurisdiction is conferred on the courts in Maryland and Virginia, and on the circuit courts in Tennessee and Missouri. In Virginia, the high court of chancery, with a single judge, was organized, and its powers and proceedings declared, in 1792; but it being found productive of great delay, three superior courts of chancery, one for each great district, were established in 1802. *Revised Code of Virginia*, vol. i. 88. 600. It since appears that the county and corporation courts, and the circuit superior courts, have chancery as well as law powers, and when sitting in chancery, they administer equity according to the course of procedure in the English chancery. 1 *Robinson's Practice*, 86. In the states of Vermont, Maine, New Hampshire, Massachusetts, Rhode Island, Connecticut, Ohio, Indiana, Illinois, Missouri, Michigan, Kentucky, North Carolina, Georgia, and Alabama, the jurisdiction of law and equity is vested in the same tribunal; but the chancery proceedings are distinct, and carried on by bill and answer, and in Georgia, and perhaps in some other states, cases in equity are generally decided by special juries, (*Dudley's Geo. Rep.* 8. *R. M. Charlton's Rep.* 134, 135, 138,) though the association of a special jury with the judge in equity, is held to be a matter of practice, and not of legal obligation. *Ibid.* 184. In some of those states, as in Maine, New Hampshire, and Rhode Island, chancery powers are confined to a few specified objects, or assumed in hard cases from necessity. In other states, as in Georgia for instance, equity powers are granted in all cases where a common law remedy is not adequate; and in Indiana, chancery powers are given not only to the supreme court and to the circuit courts, but

certain chancery powers are also conferred on the judges individually, in vacation time. In Louisiana, the distinction between law and equity, according to the theory of the English law, seems to be entirely unknown. So, in the provinces of Canada, they have no courts of chancery, and their courts of law exercise equity powers to a limited extent. In the *Revised Statute Code of Connecticut*, published in 1784, p. 48, and again in 1821, p. 195, the courts having jurisdiction of suits in equity, are directed to proceed according to the rules in equity, and to take cognizance of such matters only wherein adequate remedy cannot be had in the ordinary course of law. But under this general grant, the equity system in Connecticut appears in practice to be broad and liberal. See *Swift's Digest*, and *Connecticut Reports*, *passim*. In Ohio, the chancery powers conferred upon the supreme court and the courts of common pleas sitting as courts of chancery, by the statute of 1831, entitled "An act directing the mode of proceeding in chancery," are large and liberal, and would appear to constitute a very adequate jurisdiction. The digest in that statute of chancery powers and proceedings, is executed with much skill and ability. The same thing may be said of the chancery jurisdiction under the territorial act of Michigan, of April 23d, 1833. In Massachusetts, the equity powers of the supreme judicial court are quite limited. The power to enforce redemption is confined to a statute provision, and the mortgagor must redeem in three years after entry by the mortgagee. See *Erskine v. Townsend*, 2 *Mass. Rep.* 493. *Kelleran v. Brown*, 4 *ibid.* 443. *Skinner v. Brewer*, 1 *Pick. Rep.* 468. *Jackson on Real Actions*, 49. But in relation to trusts created by will, the courts of probate and the supreme judicial court have concurrent and general chancery powers, subject to appeal from the first to the last of those tribunals. So the supreme judicial court has ample equity powers to enforce by bill, and a course of proceeding in chancery, the specific performance of contracts concerning land, as against heirs, &c. *Mass. Revised Statutes*, 1835. Under the *Plymouth Colony Laws*, the court of assistants had not only supreme criminal and civil jurisdiction at law, but *such matters of equity as could not be relieved by law*, such as the forfeiture of an obligation, breach of covenants, and other like matters of apparent equity. Brigham's edit. 1836, p. 260. In Pennsylvania, equity powers have been gradually assumed by their supreme court, from

the necessity of the case, and for the advancement of justice, with the aid of a few legislative provisions. The provincial legislature of Pennsylvania, from its earliest existence, made repeated efforts to unite chancery powers with those of the courts of law, by the acts of 1701, 1710, and 1715, but those acts were successively disallowed by the royal council in England. The constitution of 1776, and the acts under it, gave to the courts of law a few specific equity powers, and the constitution of 1790 continued the same grant, and under the latter instrument various equity powers have been gradually granted, assumed, and amalgamated with the common law powers of the courts. Those principles of equity have been digested from the acts of the legislature, and the decisions of the supreme court, with diligence, ability, and judgment, in a clear and neat little code of equity law, under the unpretending title of '*An Essay on Equity in Pennsylvania*, by *Anthony Laussat Jr.*, Student at Law, 1826.'

"In January, 1835, the commissioners appointed to revise the civil code of Pennsylvania, made an elaborate report to the legislature, upon the administration of justice, in which they proposed to invest the supreme court and the several courts of common pleas with specific but more enlarged equity powers than had heretofore been exercised. They recommended, and in reference to the established jurisprudence, usages, and practice in Pennsylvania, perhaps wisely recommended, not the establishment of a separate court of chancery, nor the union of a court of chancery with the existing courts of law, but the incorporation or amalgamation, as heretofore, of the peculiar powers and practice of chancery with those of the common law courts in the requisite cases, and with the adaptation of the old common law forms of proceeding and existing remedies to new equity cases and purposes. Under this recommendation the legislature of Pennsylvania, in June, 1836, gave enlarged equity powers to the supreme court and the several courts of common pleas, and to be exercised according to the practice in equity, prescribed or adopted by the supreme court of the United States."

The work of Smith has an established reputation. It enters into the minutiae of the practice of the court of chancery, tracing the progress of a suit from its inception to its final consummation in all its steps. It contains also several tables calculated to enable the practitioner to see at a glance at any particular stage of the cause,

what his duty will require him to do next. It is evident that in its main features, the principles of this practice must be applicable not only wherever there is established, separate and distinct chancery courts, but wherever equity is administered distinctly and separately on a different side of a common law court. Even in those states where there is neither distinct courts nor a distinct administration of equity, there are many proceedings of an equitable kind, carried on by bill, subpoena, and answer, when the relief is specific, and means and final process analogous. In all such states, no better book can be recommended than that whose title is placed at the head of this article.

The notes of the American editor which are unusually full, have added much to the value of the book. The substance of the more important American cases is given, and general references to the others, so that without materially adding to the bulk of the volumes, the student and practitioner is readily presented with the means of easy access to authorities upon any particular point which he may desire to investigate at large.

2.—*A Law Dictionary adapted 'to the Constitution and Laws of the United States of America, and of the several States of the American Union: with References to the Civil and other systems of Foreign Law.* By JOHN BOUVIER. Second edition. Philadelphia: T. & J. W. Johnson. 8vo. 2 vols.

WE are gratified to find that this excellent work has reached a second edition; the first was a large one, and we presume the profession generally must be pretty well acquainted with its character. On its first appearance, it elicited from many gentlemen distinguished for their talents and learning, including Story, Kent, Greenleaf, and Baldwin, expressions of warm and decided approbation; and the success which they bespoke for it would seem to have been fully realized.

In preparing a second edition, Judge Bouvier has spent much time and labour. Every effort has been made to render the work comprehensive, and to increase its usefulness in every respect. We perceive by the preface, that about one thousand new subjects have been added, and many of the original articles rewritten and much improved.

The author says: "To insure correctness with regard to local matters, a correspondence was opened with one gentleman of the bar in each state, and he received from them all, with but one exception, that assistance and information which he desired; bestowed with that courteous liberality so prominent with the American bar, and with gentlemen of education. He here takes the opportunity to offer them his sincere thanks. The information thus obtained has been incorporated in his work, and it will, he hopes, greatly aid to procure to it the title of an American Law Dictionary."

Our author has devoted much time and spent much labour to make his work complete. About "one thousand new subjects have been added, and many, perhaps one half, of the original articles, have been revised and improved," as he informs us. An examination of the two editions, will make the improvements manifest. Among the new articles will be found some of the most useful, relating to international, commercial, constitutional, and criminal law, to medical jurisprudence, contracts, practice, and evidence; for example, *To Alter, Alternat, Amendment, Ancient writings, Arrameurs, Articles, Chancery practice, Articles of partnership, Bankrupt, Breach of trust, Church warden, Clearing house, Conflict of laws, Congress, Medical jurisprudence, Dead letters, Dealings, Establish, Grand, Judicial mortgage, Judicial sale, Letters rogatory, Mania, Manuscript, Ouelty, Patent French, Patent Prussian, Patent Roman, Solicitors of the treasury, Somnambulism, Son, Technical, Terror, Trade marks, and Work and labour.*

Some of the most prominent articles have been written anew, and in all cases have been greatly improved, both as to the arrangement of the matter and the matter itself. The articles, *Acknowledgment, Damages on bills of exchange, Limitation of actions*, must have cost much pains. The articles, *Audita querela, Consul, Lien, Marriage, Patents for inventions, and Wantonness*, are a fair sample of those which have been remodelled.

Under *Abbreviation*, about 1700 abbreviations are given, most of them in common use, which without the assistance here given, would puzzle not only the student, but the practising lawyer whose business it has been to read them during the course of his professional life. Many of those used by the civilians, have also been given, which leaves little to be desired on this subject.

Following the word *Construction*, there are about twelve hundred examples of phrases or words which have received a legal construction, and the places where they may be found.

References to the latest decisions are to be found throughout the work, and are abundant evidence of the industry of the author.

An improvement has been made by numbering the paragraphs of the longest articles, and by adding at the end of each an index referring to those numbers.

This Dictionary is a highly useful manual for the student, and cannot fail to be very convenient to the experienced practitioner. No one can carefully examine the work, without being fully impressed with the great research and skill which have been so successfully applied in accomplishing the design of the author. He has defined many terms belonging to systems of foreign law, which greatly adds to the value of his plan; and at the end of the work has placed an Appendix, containing Kelham's Norman Law Dictionary, which may be considered as a valuable acquisition.

The publishers have shown a commendable taste and liberality in the beautiful appearance presented by these volumes. The paper, press-work, and binding, are such as will ensure the approbation of the profession.

QUARTERLY LIST OF NEW PUBLICATIONS.

A Law Dictionary adapted to the Constitution and Laws of the United States of America, and of the several States of the American Union; with references to the Civil and other systems of Foreign Law. By *John Bouvier*. Second edition, 2 vols. Philadelphia: T. & J. W. Johnson. 1843.

Precedents of Wills, drawn conformably to the Revised Statutes of the State of New York; with practical Notes: comprising the duty of Executors, Administrators, and Guardians; dedicated by permission to the Hon James Vanderpool. By *Thomas Taylor*. Two volumes in one. New York: Gould, Banks & Co. 1843.

Reports of Cases argued and determined in the English Courts of Common Law, with Tables of the Cases and principal matters heretofore condensed, by *Hon. Thomas Sergeant*, and *Hon. Thomas M'Keen Pettit*. Now REPRINTED IN FULL. Vol. 41. Containing Cases determined in the Court of Queen's Bench, in Hilary and Easter Terms and Vacations, and Trinity Terms, 1841; and at Nisi Prius, in the Courts of Queen's Bench, Common Pleas, and Exchequer: together with Cases tried in the Circuits, and in the Central Criminal Court, from Easter Term, 1841, to Hilary Term, 1843, as reported in 1st Adolphus & Ellis, New Series, and 1st Carrington & Marshman. Philadelphia: T. & J. W. Johnson. 1843.

Reports of Cases argued and decided in the Circuit Court of the United States for the Seventh Circuit. By *John M'Lean*, Circuit Judge. Vol. 2. Columbus: H. W. Derby & H. S. Allen. 1843.

Reports of Cases argued and determined in the Supreme Judicial Court of Massachusetts. By *Theron Metcalf*. Vol. 4. Boston: C. C. Little & James Brown. 1843.

Reports of Cases decided in the High Court of Chancery, by the Right Honourable Lord Chancellor Cottenham, Lord High Chancellor of England; with Notes and References to both English and American decisions. By *John A. Dunlap*, Counsellor at Law. Vol. 14. Containing Mylne & Craig's Chancery Reports, vols. 2 and 3. 1836-37-38. 7 Will. IV. and 1 & 2 Vict. New York: Gould, Banks & Co. 1843.

The Law of Nisi Prius. Evidence in Civil Actions and Arbitration and Awards. By *Archibald John Stephens*, Barrister at Law; with Notes and References to the latest American Decisions. By *George Sharnwood*. In 3 volumes. Vol. 2. Philadelphia: Carey & Hart. 1844.

Laws of the Commonwealth of Pennsylvania, from the fourteenth day of October, 1700. Republished under the authority of the legislature; with Notes and References. Vol. 9. Philadelphia: James Kay Jr. & Brother. 1843.

Reports of Cases argued and determined in the Court of Appeals of Maryland. By *Richard W. Gill*, Clerk of the Court of Appeals, and *John Johnson*, Attorney at Law. Volume 11. Containing Cases in 1839-40-41. Annapolis: George Johnson. 1843.

Reports of Cases argued and determined in the Supreme Court of the State of Vermont. Vol. 14. Third Series. Vol. 4. By *William Weston*. Burlington: Chauncey Goodrich. 1843.



